Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

THOMAS FRY,

Petitioner,

v.

EXELON CORPORATION CASH BALANCE PENSION PLAN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A pension plan's "normal retirement age" is central to the application of ERISA and Internal Revenue Code minimum standards, including vesting and accrual requirements.

Exelon modified the definition of "normal retirement age" under its pension plan to be "five years of vesting service." Treasury interprets ERISA to require "normal retirement age" to be "an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed." 26 C.F.R. § 1.401(a)-1(b)(2)(ii).

The Second Circuit has held that ERISA requires pension plans to specify "normal retirement age" as an "age," not merely as a "period of service." *Duchow v. New York State Teamsters Conf. Pension and Ret. Fund*, 691 F.2d 74, 79-80 (CA2 1982).

Judge Easterbrook, writing for the Seventh Circuit, refused to defer to Treasury and held that ERISA § 3(24) unambiguously gives retirement plans discretion to define "normal retirement age" as "five years of vesting service."

The question presented is:

Did the Seventh Circuit err by refusing to give *Chevron* deference to Treasury and interpreting ERISA § 3(24) as unambiguously granting pension plan sponsors' discretion to define "normal retirement age" as "five years of vesting service," rather than an "age" that is normal for retirement?

PARTIES TO THE PROCEEDING BELOW

All the parties are listed in the caption. They are: (1) plaintiff-petitioner Thomas Fry, an individual who seeks to represent a class of participants in the defendant pension plan, and (2) defendant-respondent Exelon Corporation Cash Balance Pension Plan.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") at 1a-10a) is reported at 571 F.3d 644. The amended opinion of the district court, granting the defendant's motion to dismiss (App. at 17a-26a) is unreported, but available at 2007 WL 4569872. The original judgment and opinion of the district court (App. at 27a-42a) is unreported, but available at 2007 WL 2608524.

JURISDICTION

The decision of the court of appeals was entered on July 2, 2009. App. at 1a. Petitioner filed a timely petition for rehearing and rehearing en banc, which was denied on July 30, 2009. App. at 43a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 3(24) of ERISA, 29 U.S.C. § 1002(24), and the identical provision in § 411 of the Internal Revenue Code, 26 U.S.C. § 411(a)(8), both define "normal retirement age" as follows:

> For purposes of this section, the term "normal retirement age" means the earlier of--

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of--

(i) the time a plan participant attains age 65, or

(ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

2. Treasury Department regulation 26 C.F.R. § 1.401(a)-1(b)(2)(ii), 72 Fed. Reg. 28604, 28606 (May 22, 2007), in relevant part, states:

> The normal retirement age under a plan must be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

The full federal register entry is included in the Appendix at 45a-63a.

STATEMENT OF THE CASE

A. Plaintiff's Allegations

Plaintiff-petitioner, Thomas Fry, filed an action seeking to represent participants in the defendant-respondent Exelon's retirement plan whose lump sum distributions of their retirement benefits were miscalculated. Plaintiff's claim rests squarely on whether the Employee Retirement Income Security Act ("ERISA") gives retirement plans discretion to

define "normal retirement age" as "five-years of vesting service" regardless of age.

Plaintiff maintains that the Exelon plan's definition of "normal retirement age" violates ERISA on two separate grounds. First, the plan's definition does not set forth an *age* as "normal retirement age," but is rather an abbreviated "period of service" formula, prohibited by Treasury Department regulations and the Second Circuit's ruling in *Duchow v. New York State Teamsters Conf. Pension and Ret. Fund*, 691 F.2d 74, 79-80 (CA2 1982); *see also Laurent v. PricewaterhouseCoopers, LLP*, 448 F. Supp. 2d 537 (S.D.N.Y. 2006) (Mukasey, J.) (holding that defining normal retirement age as "five years of vesting service" is impermissible under ERISA). Second, the Exelon plan's definition of "normal retirement age" as "five years of vesting service" generally results in a "normal retirement age" far below what Congress understood by "normal retirement age" when enacting ERISA, and in conflict with Treasury Department regulations interpreting ERISA.

Because the Exelon plan does not provide a permissible definition of "normal retirement age," ERISA's default age (65) applies to plaintiff's claim. 26 C.F.R. §§ 1.411(a)-7(b) and 1.411(a)- 7(b)(2), Example (2). Consequently, when Exelon paid plaintiff a lump sum for the value of his pension, it was required to calculate plaintiff's benefit by projecting the so-called "cash balance"[1] of plaintiff's retirement benefit to

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[1] Cash balance plans are defined benefit pension plans, not defined contribution plans under ERISA. The so-called "cash balance" is not in a dedicated retirement account.

normal retirement age (65) at a rate that does not understate the plan's interest crediting rate and then discount the projected retirement benefit to present value at a statutorily-prescribed rate. *See* IRS Notice 96-8, 1996-1 C.B. 359 (Feb. 5, 1996); *Esden v. Bank of Boston*, 229 F.3d 154 (CA2 2000); *Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235 (CA11 2000); *Berger v. Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755 (CA7 2003); *West v. AK Steel Corp.*, 484 F.3d 395 (CA6 2007).[2]

B. Legislative and Regulatory History Regarding "Normal Retirement Age."

Congress was not writing on a blank slate when it drafted the "normal retirement age" provisions in ERISA and the IRC, and delegated authority to the Treasury Department to interpret and implement of those requirements. The Treasury Department had been regulating retirement plan definitions of "normal retirement age" for at least three decades prior to the enactment of ERISA in 1974. *See, e.g.*, 8 Fed. Reg. 9351, 9359 (July 7, 1943) ("A properly weighted retirement age determined from reasonable analyses of the experience of the employees included in the plan may be used as the normal retirement age."); 8 Fed. Reg. 14882, 14939 (Nov. 3, 1943) (same); Rev. Rul. 56-693, 1956-2 C.B. 282; 21 Fed. Reg. 7269, 7279 (Sep 25, 1956) ("Normal retirement age is not lower than age 65 for men and not lower than age 60 for women."); 33

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[2] In 2006, Congress passed the Pension Protection Act ("PPA"), Pub.L. No. 109-280, 120 Stat. 780, which, among other things, eliminates this calculation requirement for plans that meet certain requirements. Because the PPA eliminates the calculation on a prospective basis only, it is inapplicable to plaintiff's claim.

Fed. Reg. 16498, 16499 (Nov. 13, 1965) (same); 36 Fed. Reg. 9025, 9026 (May 18, 1971) ("Normal retirement age is not lower than age 65."); Rev. Rul. 71-147, 1971-1 C.B. 116 ("Ordinarily, the normal retirement age under pension and annuity plans is 65. A different age may be specified, provided that if it is lower than 65 it represents the age at which employees customarily retire in the particular company or industry and is not a device to accelerate funding.").

The legislative history of ERISA makes clear that "normal retirement age" would be "defined by regulations," and that any definition of "normal retirement age" would be consonant with our ordinary understanding of what it means to reach "retirement age." *See* S. Rep. 93-383, 1974 U.S.C.C.A.N. 4889, 4936 (Aug. 21, 1973) ("The term 'normal retirement age' *is to be defined by regulations. It is expected that a minimum and maximum age will be taken (perhaps 55 and 65)*") (emphasis added).

Following ERISA's passage, pre-existing Treasury Department regulations regarding "normal retirement age" remained in effect. *See* 72 Fed. Reg. 28604, 28604 (May 22, 2007) ("Following the enactment of [ERISA], the regulations under section 401(a) were modified to provide that the 1956 regulations continued to apply, except as otherwise provided."). Revenue Ruling 78-120, 1978-1 C.B. 117, was Treasury's first post-ERISA modification of the "normal retirement age" requirements. This ruling permitted a plan to specify a normal retirement age less than 65 without having to demonstrate to the IRS that the age specified represents the age at which employees customarily retire. *See* IRS Litigation Guideline Memorandum, 1989 LGM TL-75, 1989 WL 989834 (Sep. 22, 1989).

Revenue Ruling 71-147's other requirements remained in effect, including its requirement that plans not use a definition of "normal retirement age" as a device to accelerate funding continued in force and the requirement that plans specify an age that was customary for retirement. *Id.*; *see also Geib v. New York State Teamsters Conference Pension and Retirement Fund*, 758 F.2d 973, 976 (CA3 1985) ("Rev.Rul. 78-120 ... states only that a plan specifying a normal retirement age less than 65 qualifies for treatment as a pension plan under the Internal Revenue Code.").

Consistent with ERISA's statutory requirements, 26 C.F.R. §1.411(a)-7(b)(2) and numerous other regulations in effect for many years, have made clear that if a plan does not specify an age as normal retirement age, normal retirement age under the plan is 65. *See* 29 C.F.R § 4001.2 ("If no normal retirement age is specified in the plan, it is age 65."); 26 C.F.R. § 1.457-2 ("If no normal retirement age is specified in the plan, then the normal retirement age is the later of the latest normal retirement age specified in the basic pension plan of the State, or age 65.").

C. Factual Background

In 2002, in an acknowledged attempt to evade established requirements under ERISA, reflected in

IRS rulings and Circuit Court decisions,[3] Exelon[4] modified its pension plan's definition of "normal retirement age" from "age 65" to the completion of "five years of Vesting Service," regardless of the participant's age. The amended plan defined "normal retirement age" as follows:

> the *earlier* of
>
> (a) the date the Participant completes five years of Vesting Service and
>
> (b) the later of
>
> (i) the Participant's 65th birthday and
>
> (ii) the fifth anniversary of the date the Participant commenced participation in the Plan.

Under this definition, everyone who has vested in the plan also has reached "normal retirement age," thereby purportedly exempting the plan from ERISA and IRC standards governing the manner in which

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[3] *See* IRS Notice 96-8; *Esden v. Bank of Boston*, 229 F.3d 154 (CA2 2000); *Lyons v.* Georgia-*Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235 (CA11 2000).

[4] Several other major retirement plans also modified their definitions of "normal retirement age" in this manner. *See, e.g., Pothier v. Bank of America*, No. 3:05-CV-00238-C (W.D. N.C.); *Laurent v. PricewaterhouseCoopers, LLP*, 448 F. Supp. 2d 537 (S.D.N.Y. 2006) (Mukasey, J.) (holding that defining normal retirement age as "five years vesting service" is impermissible under ERISA).

pension benefits may accrue or be distributed during an employee's working career, before retirement age.[5]

Plaintiff left his employment at Exelon in November 2003, taking his retirement benefits in the form of a lump sum on January 1, 2004. Relying on its definition of "normal retirement age" as "five years of vesting service," the plan made no attempt to determine the value of plaintiff's pension at age 65 and merely distributed the "balance" of his fictional account.

In 2004, the Treasury Department submitted a Proposed Rule designed to prevent retirement plans from defining "normal retirement age" "so low as to be a subterfuge to avoid the requirements of [ERISA] section 401(a) . . .." 69 Fed. Reg. 65108-01, 65111 (Nov. 10, 2004).

In July 2006, plaintiff filed the present suit.

In May 2007, following full notice-and-comment, Treasury issued final regulations interpreting the discretion afforded retirement plans in defining "normal retirement age," and requiring such definitions to specify "an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed." 26 C.F.R. § 1.401(a)-1(b)(2), App. at 52a, 58a.

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[5] *See* Letter from Ira Cohen, PricewaterhouseCoopers LLP, to IRS Commissioner Charles O. Rossotti and Deputy Assistant Secretary for Tax Policy Jonathan Talisman, dated Sept. 30, 1999, *reprinted in* Tax Notes Today, Nov. 18, 1999.

D. District Court Proceedings

In July 2006, plaintiff filed his complaint in the U.S. District Court for the Northern District of Illinois, alleging violations of ERISA, the IRC and implementing Treasury Regulations, specifically 29 U.S.C. §§ 1053(e) and 1055(g), and 26 U.S.C. § 417(e) as implemented by 26 C.F.R. § 1.417(e)-1(d), and 29 U.S.C. § 1053(a) and 26 U.S.C. § 411(a), as implemented by 26 C.F.R. § 1.411(a)-4 and 4T. The district court, therefore, had federal question jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. §1132(e)(1).

On August 31, 2007, the district court granted the defendant's motion to dismiss with prejudice. In its opinion, the district court acknowledged that the plain language of ERISA § 3(24), 29 U.S.C. § 1002(24) "is open to interpretation," but nevertheless engaged in no *Chevron* analysis. *Fry v. Exelon Corp. Cash Balance Pension Fund*, 2007 WL 2608524, *5 (N.D.Ill. 2007), App. at 38a. Instead, the district court found "the better reading" of ERISA was one that confers unfettered discretion on retirement plans to define "normal retirement age" without regard to whether the resulting "normal retirement age" bears any resemblance to considers normal retirement age. *Id.*

On December 21, 2007, following plaintiff's motion to alter or amend, the district court amended its opinion and order, making clear that it would give no *Chevron* deference to the Treasury Department's interpretation of ERISA's normal retirement age requirements on the ground that the "effective date" of the regulation was after payment of plaintiff's lump

sum. *Fry v. Exelon Corp. Cash Balance Pension Fund*, 2007 WL 4569872, *2 (N.D.Ill. 2007), App. at 20a.[6]

E. Seventh Circuit Proceedings

On appeal, Judge Easterbrook affirmed the district court's dismissal. In so doing, the Seventh Circuit: (a) invalidated the governing Treasury Department regulation (26 C.F.R. § 1.401(a)-1(b)(2)(ii)) by finding that the plain language of ERISA gives retirement plans discretion to define "normal retirement age" in a manner that the regulation purports to prohibit; (b) refused to give *Chevron* deference to a Treasury Department interpretation of law because its "effective date" was after the challenged transactions, in direct contradiction to this Court's holding in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996) and the rulings of several other Circuits; and (c) approved "normal retirement age" being defined by reference to "periods of service," based on the number of hours worked, rather than an "age," as Treasury has required, in conflict with the Second Circuit's decision in *Duchow v. New York State Teamsters Conf. Pension and Ret. Fund*, 691 F.2d 74, 79-80 (CA2 1982).

Plaintiff filed a petition for rehearing and rehearing en banc, which was denied. App. at 44a. The Pension Rights Center and the American Association for Retired Persons filed an *amicus* brief in support of plaintiff. App. at 12a. Judge Easterbrook, announcing

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[6] The district court also amended its order to permit plaintiff to exhaust his administrative remedies on claims not dependent on the retirement plan's then-current definition of "normal retirement age." But those claims are not implicated in the present appeal.

a new interpretation of the rule on the time for filing *amicus* briefs, rejected the *amicus* brief as untimely. App. at 14a-16a.

REASONS FOR GRANTING THE WRIT

This petition raises fundamental questions regarding the rule of law and separation of powers in an area of high national importance, affecting tens of thousands of participants in major retirement plans across the country.

Judge Easterbrook has defiantly refused to defer to the Treasury Department's reasonable interpretation of the critical statutory term "normal retirement age," invalidating Treasury's regulations and rulings going back several decades. His interpretation of ERISA and the IRC as permitting a definition of "normal retirement age" as a period of service, as opposed to an "age" or "anniversary," is also in conflict with the Second Circuit. The Treasury Department has no intention of following Judge Easterbrook's bizarre interpretation of the statute. *See* App. at 64a ("the IRS does not agree with, and is unlikely to follow, the Seventh circuit's holding"). Only this Court can assure there is uniform regulation of retirement plans under ERISA and the IRC.

The definition of "normal retirement age" is central to applying several aspects of both ERISA and the IRC, including:

(1) the minimum vesting standards under IRC § 411(b);

(2) the rules governing suspension of benefits under IRC § 411(a)(3)(B);

(3) the rules permitting retirement plans to offset accruals under IRC § 411(b)(1)(H)(iii);

(4) the minimum benefit for non-key employees in top-heavy defined benefit plans under IRC § 416(c)(1)(A) and (E);

(5) the vesting requirements of IRC §§ 401(a)(7) and 411; and

See 72 Fed. Reg. 28604, 28604 (May 22, 2007). App. at 46a-48a. Additionally, the definition of normal retirement age affects the liabilities of the Pension Benefit Guarantee Corporation for insolvent pension plans. *See* 29 C.F.R. § 4001.2 ("If no normal retirement age is specified in the plan, it is age 65.").

The Seventh Circuit decision should be reviewed by this Court for two interrelated reasons: (1) its holding and reasoning is in direct conflict with this Court's clear rulings with respect to statutory interpretation and deference to agency interpretations of law; and (2) its holding is in conflict with the Second Circuit's decision in *Duchow v. New York State Teamsters Conf. Pension and Ret. Fund*, 691 F.2d 74, 79-80 (CA2 1982), which held that a pension plan may not define "normal retirement age" merely by reference to a "period of service."

I. Certiorari should be granted because the Seventh Circuit's refusal to give *Chevron-Smiley* deference to Treasury's reasonable interpretation of ERISA and the IRC directly

conflicts with this Court's clear rulings on statutory interpretation and deference to agency interpretations of law.

This Court has consistently held that when Congress delegates authority to regulate a statute to an executive agency and the agency's interpretation of the statute is reasonable, courts must defer to that interpretation unless Congress has directly spoken to the specific issue. *See Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) ("if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741, 744 n.4 (1996) (where "a court is addressing transactions that occurred at a time when there was no clear agency guidance, it would be *absurd* to ignore the agency's current authoritative pronouncement of what the statute means.") (emphasis added).

Congress explicitly delegated authority to regulate and interpret ERISA to the Treasury Department. 26 U.S.C. § 7805 ("the Secretary shall prescribe all needful rules and regulations for the enforcement of this title"). Under statutes governing pensions prior to ERISA's enactment in 1974, the Treasury Department had issued interpretive rulings and regulations regarding retirement plan definitions of "normal retirement age" for several decades. *See, e.g.*, 8 Fed. Reg. 9351, 9359 (July 7, 1943) ("A properly weighted retirement age determined from reasonable analyses of the experience of the employees included in the plan may be used as the normal retirement age."); 8 Fed. Reg. 14882, 14939 (Nov. 3, 1943) (same); 21 Fed. Reg.

7269, 7279 (Sep 25, 1956) ("Normal retirement age is not lower than age 65 for men and not lower than age 60 for women."); 33 Fed. Reg. 16498, 16499 (Nov. 13, 1965) (same); 36 Fed. Reg. 9025, 9026 (May 18, 1971) ("Normal retirement age is not lower than age 65."); Rev. Rul. 71-147, 1971-1 C.B. 116 ("Ordinarily, the normal retirement age under pension and annuity plans is 65. A different age may be specified, provided that if it is lower than 65 it represents the age at which employees customarily retire in the particular company or industry and is not a device to accelerate funding.").

The legislative history of ERISA makes clear that normal retirement age would (1) be "defined by regulations" and (2) that any such regulations would be consonant with the plain meaning of "retirement age." S. Rep. 93-383, 1974 U.S.C.C.A.N. 4889, 4936 (Aug. 21, 1973) ("The term 'normal retirement age' is to be defined by regulations. It is expected that a minimum and maximum age will be taken (perhaps 55 and 65)").

After ERISA's passage, pre-existing Treasury Department regulations and rulings regarding normal retirement age remained in effect. *See* 72 Fed. Reg. at 28604, App. at 48a ("Following the enactment of [ERISA], the regulations under section 401(a) were modified to provide that the 1956 regulations continued to apply, except as otherwise provided.").

Treasury's interpretation of ERISA's "normal retirement age," enacted after full notice-and-comment, requires (consistent with its earlier interpretations) that any plan definition of normal retirement age be "an *age* that is not earlier than the

earliest age that is *reasonably representative of the typical retirement age* for the industry in which the covered workforce is employed." 26 C.F.R. § 1.401(a)-1(b)(2) (emphasis added). The fact that the regulation's "effective date" is after the challenged transaction here does not alter the deference owed to Treasury's interpretation. *See Smiley*, 517 U.S. at 740-741, 744 n.4.

Judge Easterbrook's decision disregards the plain meaning of the statute, clear congressional intent and Treasury's long and consistent interpretation of "normal retirement age" as rooted in the ordinary understanding of "retirement age." The Seventh Circuit here held that ERISA § 3(24) unambiguously gives retirement plans *unfettered* discretion to define "normal retirement age," thereby invalidating the Treasury regulations on this subject. App. at 7a ("Under § 1002(24)(A) an age is the "normal retirement age" *because the plan's text makes it so*.") (emphasis added); *see Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134 (1936) ("A regulation which . . . operates to create a rule out of harmony with the statute, is a mere nullity."); *State of Illinois v. United States Dept. of Health and Human Serv.*, 772 F.2d 329, 334 (CA7 1985) ("It is clear that a regulation which is inconsistent with the statute under which it is promulgated is invalid.").

The Seventh Circuit's finding that § 1002(24)(A) is unambiguous and specifically addresses the discretion afforded retirement plans in defining "normal retirement age" is entirely unsupportable by any recognized rules of statutory interpretation, is in direct conflict with decisions of this Court and those of several Circuit Courts, as well as duly enacted

Treasury Department regulations. This Court should grant this petition and reverse the Seventh Circuit to restore the rule of law in this vital area of national importance.

A. The plain meaning of "normal retirement age" limits a plan's (and Treasury's) discretion in defining the phrase, and requires definitions of "normal retirement age" to be an "age" at which people retire.

The first question the Seventh Circuit was required to answer under *Chevron* was whether ERISA § 3(24)(A) unambiguously permits retirement plans to define "normal retirement age" as "five years vesting service," regardless of age. *Chevron*, 467 U.S. at 842-843. But the Seventh Circuit refused to answer that question, despite the fact that the parties extensively briefed that issue. If the Seventh Circuit had not simply ignored *Chevron*, the answer was obvious: Section 3(24)(A) is silent on the extent to which plans have discretion to define "normal retirement age" and the phrase is, as the district court acknowledged, ambiguous. *Fry v. Exelon Corp. Cash Balance Pension Fund*, 2007 WL 2608524, *5 (N.D.Ill. 2007), App. at 38a.

Section 3(24) of ERISA, 29 U.S.C. § 1002(24), and the identical provision in § 411 of the Internal Revenue Code, 26 U.S.C. § 411(a)(8), both permit retirement plans to specify a "normal retirement age" and provide

a default definition if the plan fails to specify a valid normal retirement age:[7]

> For purposes of this section, the term "normal retirement age" means the earlier of--
>
> (A) the time a plan participant attains normal retirement age under the plan, or
>
> (B) the later of--
>
> (i) the time a plan participant attains age 65, or
>
> (ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). But the meaning of a statute cannot be derived by looking to an isolated sentence, divorced from context and the words' ordinary meanings. *See U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 454-455 (1993) ("text consists of words living 'a communal existence,' in Judge Learned Hand's phrase, the

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[7] If the Plan's definition of "normal retirement age" is invalid, the ERISA-mandated default "normal retirement age" of 65 applies. *See Geib v. New York State Teamsters Conf. Pension and Ret. Fund*, 758 F.2d 973, 976 (CA3 1985); *see also Janowski v. Int'l Bhd. of Teamsters Local No. 710 Pension Fund*, 673 F.2d 931, 938 (CA7 1982), *vacated on other grounds*, 463 U.S. 1222 (1983).

meaning of each word informing the others and 'all in their aggregate tak[ing] their purport from the setting in which they are used.'") (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (CA2 1941)). "Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006).

No intellectually fair interpretation of Congress's statement that "the term 'normal retirement age' means . . . the time a plan participant attains normal retirement age under the plan," taken in context, in light of the statutory purposes and Treasury's longstanding authority to interpret the requirement, could find that it unambiguously gives retirement plans unfettered discretion to define "normal retirement age" as "five years of vesting service," regardless of age.

As the legislative and regulatory history reveal, Congress's silence on plan discretion was deliberate -- because under prior statutes and by Congressional design, the range of acceptable normal retirement ages was to be determined by Treasury, within reasonable bounds. *See* S. Rep. 93-383, 1974 U.S.C.C.A.N. 4889, 4936 (Aug. 21, 1973) ("The term 'normal retirement age' is to be defined by regulations. It is expected that a minimum and maximum age will be taken (perhaps 55 and 65)").

Judge Easterbrook claims the Exelon plan's definition is "lifted right out of the statute." App. at 6a. This is incorrect. The statute defines normal retirement age as the earlier of normal retirement age

under the plan ***or*** the later of age 65 ***or*** the fifth anniversary of commencing participation in the plan. 29 U.S.C. § 1002(24); 26 U.S.C. § 411(a)(8). The Exelon plan defines normal retirement age as the earlier of five years vesting service ***and*** the later of age 65 ***and*** the fifth anniversary of commencing participation in the plan. The plan's substitutions of the conjunctive "and" for ERISA's disjunctive "or" disproves Judge Easterbrook's claim that the plan's language is "lifted right out of the statute." In fact, the language in the plan, which was designed to parody ERISA's definition of "normal retirement age," is mere surplusage; for everyone's normal retirement age under the plan is measured by the "five years of vesting service," as this is the earliest of time at which persons have vested benefits under the plan.

According to the Seventh Circuit, the only limit Congress's use of the expression "normal retirement age" imposes on retirement plan definitions are: (1) that, as applied to any participant, the definition results in "an age,"[8] and (2) that the definition "is 'normal' in the sense that it applies across the board, to every participant." App. at 6a-7a.

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[8] Judge Easterbrook mistakenly assumes that "five years vesting service" is equivalent to "five years." He says: "the Plan's formula – the participant's age when beginning work, plus five years – is an 'age.' It is employee specific, to be sure, but 'age + 5' remains an age." App. at 6a. But "year of service" has a technical meaning distinct from chronological years. ERISA defines the term "year of service" as "a calendar year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has completed 1,000 hours of service." 29 U.S.C. § 1053(b)(2)(A).

The tests advanced by Judge Easterbrook impose no genuine limits on a plan's discretion in defining "normal retirement age," and they are entirely unrelated to ERISA's core purpose -- to provide for income *after retirement*. *See* 29 U.S.C. § 1002(3)(A) (defining "pension plan" under ERISA as a plan that "provides *retirement income* to employees") (emphasis added); 72 Fed. Reg. at 28605, App. at 51a ("a pension plan [is] to be maintained primarily to provide systematically for the payment of definitely determinable benefits *after retirement*.") (emphasis added). The Seventh Circuit's opinion pays no heed whatsoever to "retirement" or what people understand to be "retirement age," thereby running afoul of well-established canons of statutory interpretation as announced by this Court. *See, e.g., Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988) ("we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of the same law").

Judge Easterbrook hints there may be some outer limit to a plan's discretion in defining "normal retirement age." He says: "*It is not as if the Plan provided that 'an employee reaches normal retirement when he owns ten umbrellas.'*" App. at 6a (emphasis added). But in truth, this "ten umbrellas" definition of "normal retirement age" satisfies the tests Judge Easterbrook applied in approving Exelon's definition: Everyone is "an age" when they own ten umbrellas, and the formula could be applied "across the board, to every participant."

No intellectually fair reading of the plain language of ERISA § 3(24)(A) could find that the statute speaks directly to the question whether a plan can define

"normal retirement age" as "five years of vesting service." The Seventh Circuit's interpretation of the plain language and Congressional intent behind "normal retirement age" makes the term an undefined variable, with no meaningful content or limitations.

Because the Seventh Circuit's interpretation of "normal retirement age" is clearly erroneous and was arrived at only by ignoring this Court's rules of statutory interpretation, the Court should grant the petition.

B. The Seventh Circuit refused to give *Chevron-Smiley* deference to an agency interpretation of law, in direct conflict with unambiguous rulings by this Court.

Judge Easterbrook bases his refusal to give *Chevron* deference to the Treasury regulations on two reasons. First, he claims that agency interpretations of law embodied in regulations whose "effective date" is after the challenged transactions are generally given only prospective application. App. at 7a ("like almost all regulatory changes it operates only prospectively") (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)). Second, Judge Easterbrook suggests that Treasury's regulations amounted to a change in policy. App. at 7a ("The commentary accompanying [the newly enacted regulation (72 Fed. Reg. 28604, 28605)] acknowledges that employer choice had been honored in pre-2007 years."). The first reason given for not applying *Chevron* deference conflicts squarely with this Court's rulings in *Smiley* and *Manhattan General Equipment*. The second reason is a mere invention and is entirely unsupportable.

1. Deference to Treasury Department interpretations of law does not amount to a "retroactive" application of law.

This Court has long held that applying agency interpretations of law to cases pending at the time they are announced or go into effect does not, without more, amount to a change in the law and is not a "retroactive" application of law. More than 70 years ago, this Court made clear that applying Treasury's interpretation of law to events that occurred prior to a regulation's "effective date" is no more "retroactive" than a judicial interpretation of a statute:

> The statute defines the rights of the taxpayer and fixes a standard by which such rights are to be measured. The regulation constitutes only a step in the administrative process. It does not, and could not, alter the statute. It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.

Manhattan Gen. Equip., 297 U.S. at 135.

More recently, in *Smiley*, this Court noted that where prior regulations left the interpretation of a statute in doubt, it would be "absurd" not to apply an agency interpretation to pending cases. *Smiley*, 517 U.S. at 744 n.4. Smiley filed a class action against Citibank in 1992 alleging improper late fee charges. *Id.* at 738. The decisive issue in the case was a matter of statutory interpretation, where Treasury was given authority to interpret the statute; namely, whether the statutory term "interest" encompasses late-payment fees. *Id.* at 737.

In 1995, the Treasury Department noticed a proposed regulation for public comment, which addressed the issue raised in *Smiley*. *Id.* at 739-740. In 1996, after the California Supreme Court affirmed dismissal of Smiley's complaint, Treasury enacted the regulation. *Id.* at 740. The effective date of the regulation was April 1, 1996, four years after Smiley filed suit. 61 Fed. Reg. 4849, 4850 (Feb. 9, 1996).

The question for the *Smiley* Court, as in this case, was whether the Court should give Treasury's interpretation *Chevron* deference. Smiley argued the regulation deserved no deference because it announced a change in the agency's interpretation of the law. This Court rejected the argument. Looking to the agency's prior positions on the issue, the Court found that the regulation merely provided a needed clarification of an ambiguity in prior interpretations and was not a "change of official agency position." *Smiley*, 517 U.S. at 742.

Here, as in *Smiley*, Treasury regulations were ambiguous as to whether pre-ERISA regulations of plan definitions of "normal retirement age" still applied. A post-ERISA revenue ruling, in commentary, included a sentence, which if taken literally, could mean that retirement plans could specify absolutely any "age" as normal retirement age: "In view of the definition of normal retirement age found in section 411(a)(8) of the Code, and in the absence of any statutory prohibition or limitation, a plan may specify *any age* that is less than 65 as the normal retirement age." Rev. Rul. 78-120 (emphasis added). The Exelon plan, along with Seventh Circuit, maintains this sentence in a revenue ruling gave it unfettered discretion to define "normal retirement age"

to be "five years of vesting service." The argument bears no scrutiny.

Rev. Rul. 78-120, on its face, gives discretion only to specify an **"age"** for "normal retirement age" – something the Exelon plan fails to do. Rev. Rul. 78-120 gives no blessing to Exelon's "five years of vesting service" definition. Treasury has never approved defining "normal retirement age" merely as a period of "service" and has never said or suggested that "five years of vesting service" was a permissible definition of normal retirement age. Judge Easterbrook's suggestion that Treasury reversed its position *on the Exelon Plan's definition* of normal retirement age is erroneous.

Treasury has never interpreted "normal retirement age" to permit a subterfuge, and has consistently sought to apply Congress's direction to establish a minimum and maximum retirement age under ERISA and the IRC. *See* S. Rep. 93-383, 1974 U.S.C.C.A.N. 4889, 4936 (Aug. 21, 1973) ("It is expected that a minimum and maximum age will be taken (perhaps 55 and 65)"); 8 Fed. Reg. 14882, 14939 (Nov. 3, 1943) ("A properly weighted retirement age determined from reasonable analyses of the experience of the employees included in the plan may be used as the normal retirement age."); 36 Fed. Reg. 9025, 9026 (May 18, 1971) ("Normal retirement age is not lower than age 65."); Rev. Rul. 71-147 ("Ordinarily, the normal retirement age under pension and annuity plans is 65. A different age may be specified, provided that if it is lower than 65 it represents the age at which employees customarily retire in the particular company or industry and is not a device to accelerate funding.").

Treasury's interpretation of "normal retirement age" requires that any plan definition of normal retirement age be "an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed." 26 C.F.R. § 1.401(a)-1(b)(2)(ii). As in *Smiley*, the Treasury regulation at issue here did not result in a "change of official agency position." *Smiley*, 517 U.S. at 742.

In *Smiley*, this Court made clear that Treasury's interpretations of statutory provisions contained in regulations deserve full *Chevron* deference, regardless of whether the regulations are enacted or have an "effective date" after the challenged transactions:

> Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that *the ambiguity would be resolved, first and foremost, by the agency,* and desired the agency *(rather than the courts)* to possess whatever degree of discretion the ambiguity allows.

Id. at 740-741 (emphasis added) ("Nor does it matter that the regulation was prompted by litigation, including this very suit."); *see also National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

In rejecting Smiley's arguments against deferring to the Treasury Department, this Court specifically distinguished the case on which the Seventh Circuit here relied, making clear that *Bowen* does *not* stand for the proposition that regulatory interpretations issued after the commencement of litigation are given

no deference (the precise proposition for which Judge Easterbrook cited *Bowen*). Rather, *Bowen* held that the Court "den[ies] deference 'to agency *litigating positions that are wholly unsupported by regulations, rulings, or administrative practice*.'" *Smiley*, 517 U.S. at 741 (emphasis added) (quoting *Bowen*, 488 U.S. at 212).

Unlike *Bowen*, in this case (as in *Smiley*) the regulation is a "full-dress regulation, issued by [Treasury] and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation." *Id.*

The Seventh Circuit refused to give the Treasury Department deference, in defiant opposition to this Court's clear rulings in *Chevron*, *Smiley* and other cases, and in direct conflict with the rulings of several other Circuits. *See, e.g., ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689 (CA9 2000) ("Normally, when an amendment is deemed clarifying rather than substantive, it is applied retroactively.") (quotations omitted); *Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1283 (CA11 1999) ("concerns about retroactive application are not implicated when an amendment that takes effect after the initiation of a lawsuit is deemed to clarify relevant law rather than effect a substantive change in the law").

2. *There is no reasonable basis for the claim that the commentary to the Treasury regulation "acknowledged" that it had "honored" "employer choice" in the selection of normal retirement age "in pre-2007 years."*

Judge Easterbrook's second reason for refusing to give *Chevron* deference to the Treasury regulation is: "The commentary accompanying [the newly enacted regulation (72 Fed. Reg. 28604, 28605)] acknowledges that employer choice had been honored in pre-2007 years." App. at 7a. Judge Easterbrook's statement is artifice.

The commentary in question states: "Under Rev. Rul. 78-120, for purposes of section 411, a pension plan is permitted to have a normal retirement *age* lower than age 65, regardless of the age at which employees customarily retire in the particular company or industry." 72 Fed. Reg. 28604, 28605, App. at 49 (emphasis added). This case, however, does not challenge whether the Exelon plan's normal retirement age is the age at which employees customarily retire in the particular company or industry -- because the Exelon plan specifies *no age* as normal retirement age. Its definition is disconnected from age and anniversaries, and is based on the analytically distinct concept of "five years of vesting service." *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993) ("Because age and years of service are analytically distinct, . . . it is incorrect to say that a decision based on years of service is necessarily 'age based.'").

Moreover, as has been explained, *infra* at 5-6, 24, the upshot of Revenue Ruling 78-120 was that a plan could specify a normal retirement age less than 65 *without having to demonstrate to the IRS* that the age specified represents the age at which employees customarily retire. *See* IRS Litigation Guideline Memorandum, 1989 LGM TL-75, 1989 WL 989834 (Sep. 22, 1989). It left undisturbed prior Treasury

Department interpretations of "normal retirement age," including Revenue Ruling 71-147's requirement that plans not use a definition to accelerate funding *and* the requirement that plans specify both an age and one that was typical for retirement. *Id.*; Rev. Rul. 78-120; *Geib*, 758 F.2d at 976.

In short, there is no basis for Judge Easterbrook's insinuation that Treasury has acknowledged that it honored the sort of "employer choice" exercised by Exelon. Nor is there any basis for finding that Treasury announced a "change of official agency position" by enacting 26 C.F.R. § 1.401(a)-1(b)(2)(ii).

3. There is no dispute that the Treasury Department regulation is reasonable.

Under *Chevron*, *Smiley* and other decisions of this Court, where the statute is ambiguous, or does not speak directly to the question presented in the suit, courts are required by principles of separation of powers to defer to executive agency interpretations of law, provided the interpretation is reasonable.

There can be no question that the Treasury Department interpretation of ERISA and the IRC was reasonable. The statutes permit plans to specify a "normal retirement age." Treasury has interpreted this as requiring retirement plan definitions of "normal retirement age" to be "an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed." 26 C.F.R. § 1.401(a)-1(b)(2)(ii). Neither the plan, the district court, nor the Seventh Circuit offers any

reason to show that Treasury's interpretation of the law is unreasonable.

Because the Seventh Circuit has refused to follow directly applicable rulings of this Court respecting the interpretation of statutes and the deference owed to executive agencies, this Court's action is necessary to restore the rule of law respecting separation of powers and to protect the rights of thousands of participants in retirement plans with definitions of "normal retirement age" like Exelon's. This Court should grant the present petition for certiorari, and reverse the Seventh Circuit.

II. Certiorari should be granted to resolve the conflict between the Seventh Circuit and the Second Circuit on the question whether normal retirement age may be defined by a period of service, without specifying an "age" or "anniversary."

The Seventh Circuit appears to concede that a plain reading of ERISA and the IRC requires a plan's "normal retirement age" to be an "*age* and not some different measure (such as $20,000 or 175 pounds)." App. at 5a. But Judge Easterbrook's opinion concludes that defining "normal retirement age" as "the date the Participant completes five years of Vesting Service" satisfies this "age" requirement. This conclusion is directly at odds with the conclusion reached on this precise issue by the Second Circuit in *Duchow*.

The dispute in *Duchow* focused on the same question at the heart of this case: can a pension plan calculate the benefit payable to a departing participant based on a "normal retirement age" defined by

reference to the participant's "years of vesting service." The Second Circuit concluded that the answer was "no" – a pension plan cannot lawfully define "normal retirement age" by reference to a participant's years of service with the plan's sponsor. Rather, normal retirement age had to be "***linked to age without regard to length of service***." *Duchow*, 691 F.2d at 78 (emphasis added). That is, the statutes require that "normal retirement age" be defined in a manner that identifies "a certain time regardless of the employee's years of service." *Id.* at 77.

In *Duchow*, the Second Circuit expressly considered and rejected the employer's contention that "a service requirement is incorporated by the portion of the definition of 'normal retirement age' that refers to the plan participant's '10th anniversary,' *i.e.* . . . the 10th anniversary of the time a plan participant commenced participation in the plan." *Id.* at 79 (ERISA § 1002(24)(B)(ii) was later amended to refer to the "5th anniversary"). Directly at odds with the conclusion reached by the Seventh Circuit, the Second Circuit explained that the concept of "anniversaries" and "years of service" were <u>not</u> interchangeable:

> We believe that 'anniversary' was intended to have its ordinary meaning rather than the strained construction defendants would give it. . . . The word plainly denotes a date rather than the years between the date and the past event. . . . There is no reason to believe Congress intended a different denotation in the definition of normal retirement age. Further, to construe the use of the word 'anniversary' as imposing a service requirement would be inconsistent with

> the Act's legislative history and purposes discussed above.
>
> [H]ad Congress intended 'normal retirement age' to be dependent on ten years of service, it would hardly have selected such convoluted and imprecise (for defendant's purposes) language as 'the 10th anniversary of the time a plan participant commenced participation in the plan' instead of a clear and direct phrase such as 'the participant's completion of ten years of service.'

Id. at 79-80.

Applying traditional tools of statutory interpretation, the Second Circuit found that, in addition to being inconsistent with the plain reading of the statute, Congress could not have intended to permit pension plans to define "normal retirement age" by reference to a participant's years of service, rather than an age or anniversary. *Id.* at 79 ("the language, history and purposes of ERISA point forcefully to the conclusion that the first clause of § 203(a) imposes a vesting requirement that is *independent of the service-period vesting standards.*") (emphasis added). *See also Hazen Paper Co.*, 507 U.S. at 611 ("age and years of service are analytically disinct").

The Second and Seventh Circuits cannot both be right: "normal retirement age" either can be defined by reference to years of service or it cannot be. Former Chief Judge and Attorney General Michael Mukasey was correct when he sided with the Second Circuit in *Laurent v. PricewaterhouseCoopers, LLC*, 448 F. Supp.

2d 537, 546 (S.D.N.Y. 2006) ("a normal retirement age cannot be defined in reference to years of service"). The Treasury Department's regulations, ignored by the Seventh Circuit, confirm that a plan's normal retirement age must indeed be an "age," in line with the Second Circuit's decision in *Duchow*.

Judge Easterbrook failed to appreciate that Exelon's "five years of vesting service" definition does not correlate with any age or anniversary. The Seventh Circuit concluded that a pension plan could satisfy the requirement that "normal retirement age" be an "age" by using the formula "the participant's age when beginning work, plus five years." The Panel reasoned that "age plus five years" or "age + 5" is an *age*. App. at 6a. But "age + 5" is not the Exelon plan's formula. The Plan's actual "normal retirement age" formula is "the *date* the Participant completes *five years of Vesting Service*." (emphasis added). The completion of five years of vesting service (even if framed as "age plus 5 years of vesting service") is not an age.

A formula can reasonably be said to specify an age only if one can plug a given age or date into the formula and it spits out another fixed age or date, *with no other variables*. Otherwise, there is no effective constraint and the statute's use of the term "age" is superfluous. Plug an actual age into Judge Easterbrook's hypothetical "age + 5" formula and you get another fixed, identifiable age. But plug an age into Exelon's service-based formula and you get an unknown future "date." This is because a "year of service" is a term of art under ERISA, which signifies more than the mere passage of time. A "year of service" is something earned by an employee who

works a defined number of hours, typically 1,000 (or its equivalent), during a 12-month period. 29 U.S.C. § 1053(b)(2)(A). Thus, while "age plus five years" does identify another future age, "age plus five years of vesting service" does not.

The terms "age" and "years of service" have distinct meanings and Congress did not intend the terms to be used interchangeably. The evidence in the statute abounds. The terms are used throughout ERISA and the IRC as alternatives, not equivalents. *See, e.g.*, 29 U.S.C. § 1053(b)(1)(G), and IRC § 411(b)(1)(G) (prohibiting a reduction in accrued benefits on account of an increase in "age *or* service") (emphasis added).

That is why in a narrowly-defined situation (participants who join a plan after age 60), § 1002(24)(B)(ii) permits normal retirement age to be defined by reference to the "5th anniversary" of a participant's eligibility date – not the "5th year of service" following such date. The 5th anniversary of the date (or age) a participant begins work is the fixed date (or age) 5 years later, and is independent of any other variable such as whether the participant works continuously in each of the intervening years. The concepts of "5th anniversary" and "completion of 5 years of service" are therefore meaningfully distinct. The Seventh Circuit committed clear error in concluding otherwise, in conflict with the Second Circuit's holding in *Duchow*.

The Court should grant the present petition to resolve this conflict between the Circuits and reverse the decision below.

CONCLUSION

Petitioner respectfully requests that the Petition for Writ of Certiorari be granted for full briefing or that the Court summarily reverse and remand the decision for further proceedings consistent with this Court's rulings in *Chevron* and *Smiley*.

Respectfully Submitted,

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APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 08-1135

[Filed July 2, 2009]

THOMAS FRY,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
EXELON CORPORATION CASH BALANCE PENSION PLAN,	)
	)
Defendant-Appellee.	)
	)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 06 C 3723—**William T. Hart**, *Judge*.

ARGUED APRIL 3, 2009—DECIDED JULY 2, 2009

Before EASTERBROOK, *Chief Judge*, and EVANS and SYKES, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. The Exelon Corporation Cash Balance Pension Plan is a

defined-benefit plan that works like a defined-contribution plan, except that the individual accounts are virtual. All of the Plan's assets are held in a single trust; the Plan does not have a separate pot of assets to match each employee's account. *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636 (7th Cir. 2006), and *Berger v. Xerox Corp. Retirement Income Guarantee Plan*, 338 F.3d 755 (7th Cir. 2003), discuss more fully the nature of a cash-balance plan.

Many pension plans, including Exelon's, give workers the option of taking a lump-sum distribution when they quit or retire. A defined-contribution plan just turns over the balance of the account. 29 U.S.C. §1002(23)(B). A defined-benefit plan operates under different rules—or did until 2006, when the addition to ERISA of 29 U.S.C. §1053(f) brought the treatment of lump-sum distributions into harmony. Our plaintiff, Thomas Fry, left Exelon in 2003, so we describe the former approach, which required pension plans to start with the current balance and add any contractually promised interest (or any other form of guaranteed increase in benefits) through the employee's "normal retirement age." The plan then discounted the resulting number to present value using the "annual rate of interest on 30-year Treasury securities for the month before the date of distribution." 29 U.S.C. §1055(g)(3), incorporated by 29 U.S.C. §1053(e)(2).

This process was designed to ensure the actuarial equivalence of the lump-sum payment and the pension available at retirement. But, if the Treasury rate does not match the market return, the process misfires. *Berger* describes the mechanics. If the Treasury rate is less than a plan's annual guarantee—as it normally will be, because Treasury bonds have very little risk,

and a correspondingly low rate of return—the lump sum balloons (a 3.5% difference in the rates doubles the cash paid out to someone who leaves at 45 and does not plan to retire until 65). If the Treasury rate exceeds the plan's guarantee, as it may during a time when the stock market is in decline, the lump sum shrinks accordingly. For most of the 1990s and 2000s, the Treasury rate was below the guarantees offered by cash-balance plans. This gave employees a big incentive to quit early and claim lump-sum distributions; it also encouraged pension plans to reduce their promised annual returns, which hurt all employees (not just those who planned a strategic early departure).

The 2006 amendment fixed the problem for all cash-balance plans. It also avoided the uncertainty inherent in a need to estimate what rates of return lie in the future. (Did anyone in 2003 predict accurately that the stock market as a whole would rise from 2004 through 2007 but plummet in 2008?) Many plans, of which Exelon's was an example, had applied a self-help fix. When it was established in 2002, Exelon's Plan provided that each employee's "normal retirement age" arrived after five years on the job. This was also the Plan's vesting date, and thus the first opportunity to demand a lump-sum distribution when leaving for other employment. Because ERISA required the addition of interest (and discounting at the Treasury rate) only through each participant's "normal retirement age," this enabled Exelon's Plan to avoid the entire adjustment process and distribute the balance of the worker's virtual account just as a defined-contribution plan would distribute the balance of an actual account.

Thomas Fry opted into the Exelon cash-balance Plan when it was created in 2002. His virtual account was funded initially with the actuarial value of his traditional defined-benefit pension. Exelon contributes to the Plan 5.75% of each participant's annual compensation, and it adds annual interest (called "investment credits") at the greater of 4% or an average of the 30-year Treasury bond rate and the average return on the Standard & Poors 500 index. Fry quit in 2003, at age 55, after working more than five years at Exelon. He asked for and received the value of his account, more than $500,000, and filed this suit because the Plan gave him just the balance—rather than the balance plus "investment credits" through 2013 (when he will turn 65), discounted to present value at the Treasury rate (which was 5.16% in October 2003, the month before Fry retired). His suit contends that the Plan's definition of "normal retirement age" is invalid and that he is entitled to credits through age 65; the district court held, however, that the Plan satisfies ERISA's requirements. 2007 U.S. DIST. LEXIS 65355 (N.D. Ill. Aug. 31, 2007).

Fry makes much of the fact that the Plan's definition of "normal retirement age" is designed to work around the augment-and-discount process required by the pre-2006 version of §1053(e)(2)(B). He calls this an "evasion"; the Plan calls it careful design. No matter. Names do not decide concrete cases. Employers are entitled to vary by contract those aspects of pension plans ERISA makes variable, and they may act in their own interest when doing so, see *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), just as participants are entitled to the benefit of terms (such as vesting rules) that the law makes immutable.

Lowering the normal retirement age means that lump-sum distributions may be smaller, but it has benefits for the workers, such as accelerating the application of the anti-forfeiture clause, which like §1053(e)(2)(B) before 2006 is keyed to the plan's "normal retirement age". See *Contilli v. Teamsters Local 705 Pension Fund*, 559 F.3d 720 (7th Cir. 2009).

How much discretion employers enjoy when selecting a "normal retirement age" depends on the language of ERISA, for the phrase is a defined term:

> The term "normal retirement age" means the earlier of—
>
> (A) the time a plan participant attains normal retirement age under the plan, or
>
> (B) the later of—
>
> (i) the time a plan participant attains age 65, or
>
> (ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

29 U.S.C. §1002(24). Exelon says that subsection (A) allows it to define "normal retirement age" as it pleases. Fry insists that the statute implies restrictions: first that the "normal retirement age" be an *age* rather than a different measure (such as $20,000 or 175 pounds); and second that it be "normal" (which is to say, the mean or median for retirement at the firm, rather than age 25 or the age of the incumbent President).

Fry's first argument flops because the Plan's formula—the participant's age when beginning work, plus five years—is an "age." It is employee specific, to be sure, but "age + 5" remains an age. It is not as if the Plan provided that "an employee reaches normal retirement age when he owns ten umbrellas." The Plan's formula not only specifies an "age" but also is lifted right out of the statute. Subsection (B)(ii) defines as the highest possible "normal retirement age" (for a person hired at 65 or older) "the 5th anniversary of the time a plan participant commenced participation in the plan." Making that statutory definition of "normal retirement age" universally applicable can't be rejected on the ground that the formula does not yield an "age." ERISA does not require the "normal retirement age" to be the same for every employee; §1002(24)(B)(ii) shows that too.

As for the argument that five years on the job is not the "normal" retirement age: §1002(24) does not compel a pension plan's retirement age to track the actuarial tables. If it did, then instead of granting discretion to the plan's sponsor the statute would read something like: "The term 'normal retirement age' means the median age at which participants in the plan retire." But the statute does not say this, nor does it say that the "normal retirement age" must be at least 62 but cannot exceed 65. Some industries have much younger retirement ages—under 30 for football and under 40 for futures commission merchants. The statutory cap at age 65 itself requires some departure from normal practices at law firms, universities, and other employers where people work past the time when they can start drawing full Social Security benefits (which for those approaching retirement today is 66 rather than 65).

Under §1002(24)(A) an age is the "normal retirement age" because the plan's text makes it so. The age in the plan is "normal" in the sense that it applies across the board, to every participant in the plan. (It is important to understand that a "normal retirement age" in a pension plan does not control when employees must retire, but only when certain rights vest and how benefits are adjusted. That's why it makes sense to speak of an age being "normal" to the plan's operation rather than to anyone's retirement prospects.)

In 2007 the Treasury Department issued a regulation providing that a plan's "normal retirement age" must be "reasonably representative of the typical retirement age for the industry" (subject to safe harbors for employers with unusually early or late retirement patterns). 72 Fed. Reg. 28604, 28606 (May 22, 2007), amending 26 C.F.R. §1.401(a)–1(b). Fry contends that this regulation supports his position. It does not, because like almost all regulatory changes it operates only prospectively. See §1.401(a)–1(b)(4). See also *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). The commentary accompanying this regulation acknowledges that employer choice had been honored in pre-2007 years. 72 Fed. Reg. at 28605. The regulation therefore does not affect the calculation of lump-sum distributions in 2003. (Whether the regulation is within the scope of the agency's interpretive discretion, see *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is a question not presented here.)

Fry chastises the district court for disagreeing with *Laurent v. PricewaterhouseCoopers LLP*, 448 F. Supp. 2d 537 (S.D. N.Y. 2006). Decisions of district judges

lack authoritative force in or outside their districts; they have persuasive weight only. The district judge in *Laurent* was trying to read the tea leaves in *Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000). And *Esden* itself did not interpret §1002(24). It dealt with the same subject as *Berger*: how a cash-balance plan calculates actuarial value when an employee elects a lump-sum distribution before a given plan's "normal retirement age." As far as we can tell, ours is the first appellate opinion on the interaction between §1002(24) and the pre-2006 requirement of actuarial adjustments to the hypothetical balance. Instead of guessing how other judges might approach the subject, we have analyzed the statutory language directly. And on the understanding of "normal" that we have just explained, the statutory language allows employers to specify a "normal retirement age" that differs from typical retirement patterns.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

[SEAL]

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

July 2, 2009

BEFORE:

FRANK H. EASTERBROOK, Chief Judge

TERENCE T. EVANS, Circuit Judge

DIANE S. SYKES, Circuit Judge

No.: 08-1135	THOMAS FRY, and all others similarly situated, Plaintiff - Appellant v. EXELON CORPORATION CASH BALANCE PENSION PLAN, Defendant - Appellee

Originating Case Information:
District Court No: 1:06-cv-03723 Northern District of Illinois, Eastern Division District Judge William T. Hart

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

[SEAL]

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

July 27, 2009

BEFORE

FRANK H. EASTERBROOK, Chief Judge

No.: 08-1135	THOMAS FRY, and all others similarly situated, Plaintiff - Appellant v. EXELON CORPORATION CASH BALANCE PENSION PLAN, Defendant - Appellee

Originating Case Information
District Court No: 1:06-cv-03723 Northern District of Illinois, Eastern Division District Judge William T. Hart

Upon consideration of the **MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF AARP AND THE PENSION RIGHTS CENTER IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING AND REHEARING EN BANC**, filed on July 23, 2009, by counsel for the AARP and the Pension Rights Center,

IT IS ORDERED that the motion is **DENIED** as untimely.

form name: **c7_Order_3J** (form ID: **177**)

APPENDIX C

In the
United States Court of Appeals
For the Seventh Circuit

No. 08-1135

[Filed August 12, 2009]

THOMAS FRY,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
EXELON CORPORATION CASH BALANCE PENSION PLAN,	)
	)
Defendant-Appellee.	)
	)

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 06 C 3723—**William T. Hart**, *Judge*.

DECIDED AUGUST 12, 2009

Before EASTERBROOK, *Chief Judge*, in chambers.

EASTERBROOK, *Chief Judge*. This appeal was decided on July 2, and a petition for rehearing en banc

was filed on July 15. Eight days later AARP and the Pension Rights Center sought leave to file a brief as *amici curiae* in support of the petition. I denied that request as untimely, and on July 30 the court entered an order denying rehearing and rehearing en banc. On August 3 the court received a motion to reconsider the denial of leave to participate as *amici curiae*. Because it would be possible for the court to recall its mandate, receive the *amicus* brief, and reconsider the petition for rehearing en banc, I think it appropriate to address this motion and explain for the bar's benefit why I deem the request untimely.

The proposed *amici* rely on Fed. R. App. P. 29(e), which says that "[a]n amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed." And Rule 26(a)(2) adds that, when another rule gives a period less than 11 days, weekends and holidays are excluded from the count. So 7 days becomes at least 9, and the filing 8 days after the petition is timely, the argument concludes. (When changes to Rule 26 take effect on December 1, 2009, the 7 days of Rule 29(e) will become real calendar days, but for now 7 = 9.)

The problem with relying on Rule 29(e) is that the brief must be filed within 7 days of "the principal brief of the party being supported". The "principal brief" of Thomas Fry, the party being supported, was filed on April 10, 2008, more than a year before the potential *amici* tendered their brief. A "principal brief" is the opening brief on the merits, as opposed to a reply brief or another variety of brief. A petition for rehearing en banc is not a "brief" of any kind; further briefing may follow a grant of rehearing, but the petition for

rehearing is a request for discretionary relief rather than a brief. Rule 29, which covers *amicus* briefs, appears in a sequence of rules (28 through 32.1) that deals with the contents, form, and timing of merits briefs; Rule 34 deals with oral argument; and Rules 35 through 41 with post-decision matters. It would be unsound to treat the phrase "principal brief" in Rule 29(e) to refer to a document other than the opening brief on the merits.

Not only unsound but also unfortunate. This circuit handles petitions for rehearing, and rehearing en banc, with dispatch. Each petition is distributed to the judges immediately. Within 10 days a judge on the panel should vote on the petition for rehearing, and each active judge not on the panel should decide whether to call for a response to a request for rehearing en banc. Operating Procedure 5(a), 9(c). If none of the judges calls for a response within 10 days, the court enters an order as soon as the vote on the request for rehearing by the panel has been completed. This court denied Fry's petition for rehearing en banc on the 11th business day after its filing. It would not be possible to act on this schedule if the court always had to wait at least 9 days after the petition's filing to see whether an *amicus* brief would be tendered.

Moreover, distributing an *amicus* brief a week or more after a petition for rehearing would increase the judicial time needed to resolve the case. Most judges read and act on petitions for rehearing (or rehearing en banc) the day they are received. A late-arriving *amicus* brief would require the judge not only to read the *amicus* filing but also to re-review the panel opinion and the petition for rehearing, in order to supply the context for the *amicus*'s submission. Rule

29(e) does not cause such repetitious work when applied to briefs on the merits, for none of the merits briefs is distributed to the judges until all are in. The extra 7 days permit a potential *amicus* to avoid repeating arguments that appear in the principal briefs. This conserves judicial time. Allowing an *amicus* brief to be filed 7 or more days after a petition for rehearing, by contrast, would squander judicial time.

Someone who wants to file as *amicus curiae* in support of a petition for rehearing, or rehearing en banc, must use the same schedule as the petitioner. A potential *amicus* who needs extra time should ask the litigant to seek an extension from the court and defer filing the petition. AARP and the Pension Rights Center did not do this. Their submission was properly returned as untimely. The court has discretion to accept an untimely filing when the value of the potential *amicus* brief justifies the inconvenience of requiring the judges to review a case multiple times, but in my judgment this brief did not possess that exceptional quality. The motion for reconsideration is denied.

8-12-09

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 06 C 3723

[Filed December 21, 2007]

THOMAS FRY, and all others similarly situated,	)
Plaintiff,	)
v.	)
EXELON CORPORATION CASH BALANCE PENSION PLAN,	)
Defendant.	)

OPINION AND ORDER

Plaintiff Thomas Fry contends he was entitled to a lump sum distribution from his "cash balance" retirement plan (defendant Exelon Corporation Cash Balance Pension Plan ("the Plan")) that included a "whipsaw calculation." See generally Berger v. Xerox Corp. Retirement Income Guarantee Plan, 338 F.3d 755, 757-63 (7th Cir. 2003); West v. AK Steel Corp., 484 F.3d 395, 399-401 (6th Cir. 2007). Whether Fry

was entitled to a whipsaw calculation depended on the definition of "normal retirement ages as used in the Employee Retirement and Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. On defendant's motion to dismiss, it was held that the Plan's definition of normal retirement age based on a term of service was permitted under ERISA and therefore plaintiff was not entitled to a whipsaw calculation since he retired at normal retirement age under the terms of the Plan. See Fry v. Exelon Corp. Cash Balance Pension Fund, 2007 WL 2608524 (N.D. Ill. Aug. 31, 2007) ("Fry I"). Plaintiff's individual cause of action was dismissed with prejudice and the putative class claims were dismissed without prejudice.

Plaintiff timely moved for reconsideration of the dismissal of his individual claims.[1] Plaintiff argues that the court failed to address the effect of amendments to tax regulations that occurred in May 2007, well after plaintiff's lump sum distribution. Plaintiff also contends that the court inappropriately considered an argument raised by defendant in its reply and improperly made fact determinations regarding accrued frozen benefits that plaintiff had from a prior pension plan that the Plan replaced. Alternatively, plaintiff contends his claims regarding the accrued frozen benefits should have been dismissed without prejudice to leave open the possibility of pursuing administrative remedies regarding those benefits.

---

[1] Dismissal of the putative class claims is not addressed in the motion for reconsideration.

This bench disfavors rulings based on waiver. Attempts are made to provide parties with sufficient opportunity to address all appropriate issues. For example, on defendant's motion to dismiss, initially there was defendant's supporting brief, a supplement to that brief, plaintiff's answer brief, and defendant's reply. Thereafter, the parties were granted leave to file plaintiff's surreply, defendant's response to the surreply, plaintiff's supplement to his surreply, and defendant's response to the supplement. That still was not the end. Defendant submitted supplemental authority with an accompanying brief, which was the new regulations now relied on by plaintiff in his motion for reconsideration. Plaintiff filed a response to the supplemental authority and defendant filed a reply. Thereafter, plaintiff filed another citation to supplemental authority (a Seventh Circuit case) with an accompanying brief and defendant filed a response. Each party had a more than ample opportunity to address issues and respond to the other side's contentions prior to the motion to dismiss being granted.

The new regulations relied on by plaintiff were issued on May 22, 2007 to be effective that date[2] and prospectively. See 26 C.F.R. § 1.401(a) - 1(b)(4); Distribution From a Pension Plan Upon Attainment of Normal Retirement Age, 72 Fed. Reg. 28604 (May 22, 2007). As part of a policy change permitting certain distributions prior to retirement, the new regulations require that "normal retirement age under a plan must be an age that is not earlier than the earliest age that

---

[2] In certain situations not applicable to this case, the effective date is later.

is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed." 26 C.F.R. 1.401(a)-1(b)(2)(i). Thus, unlike the ERISA statute (29 U.S.C. § 1002 (24)) and tax statute (26 U.S.C. § 411 (a) (8)) and then-applicable regulations discussed in Fry I, the new regulations require that normal retirement age be an actual age, not a length of service. There is no indication that this change is based on a reinterpretation of statutory provisions defining normal retirement age. To the contrary, tax regulations tracking the statutory language defining normal retirement age were not changed. See 26 C.F.R. §§ 1.411 (a) -7 (b) (I), 1.401 (a) -11 (b) (5).

In Fry I, the new regulation was not addressed because it is prospective only and therefore inapplicable to plaintiff's lump sum distribution that occurred years prior to the effective date of the new regulation. Plaintiff now argues that, even if not directly applicable to his situation, the regulation is an administrative interpretation of the statute that is subject to deference and instructive as to how the relevant statutes should be construed. There, however, is no indication that the new rule is based on a reinterpretation of the statutory definition of normal retirement age. The new regulation, which is prospective in nature, clearly states that prior to the May 22, 2007 effective date, a plan was "permitted to have a normal retirement age lower than age 65, regardless of the age at which employees customarily retire in a particular company or industry." 72 Fed. Reg. 28604 (May 27, 2007) (citing Rev. Rul. 78-120, 1978-1 C.B. 117).

The prior ruling will not be modified based on the new regulations. The holding that plaintiff attained normal retirement age under the terms of a cash balance plan and therefore was not entitled to a whipsaw calculation will not be modified.

In his original answer brief to the motion to dismiss, plaintiff contended that, regardless of defendant's contentions regarding normal retirement age under the Plan, distribution of his accrued frozen benefits that were converted from a prior traditional retirement plan was still entitled to a whipsaw calculation because the service-based normal retirement age provision of the Plan did not apply to those benefits. Instead, plaintiff contends the normal retirement age applicable to the accrued frozen benefits was age 65. In its reply, defendant responded that age 65 retirement was already used to calculate how much went into that account at the time of conversion and therefore an additional whipsaw calculation was not necessary. Although permitted to file a surreply as well as all the other additional briefs listed above, plaintiff never disputed this contention contained in defendant's reply. Therefore, the court accepted this legal representation as uncontested and adopted it as the basis for dismissing any claim based on the accrued frozen benefits. The court, though, noted the possibility that plaintiff could challenge any underlying factual dispute or dispute about plan interpretation in administrative proceedings to the extent still available. See Fry I, 2007 WL 2608524 at *5.

After judgment was entered, plaintiff has finally responded to defendant's contention regarding the accrued frozen benefits. Since plaintiff had the

opportunity to respond to this contention in his surreply but did not, cf. Thomas v. Exxon Mobil Oil Corp., 2007 WL 489225 *3 (N.D. Ind. Feb. 8, 2007); Black & Decker, Inc. v. Robert Bosch Tool, 2006 WL 3883937 *3 (N.D. Ill. Dec. 27, 2006); Fletcher v. ZLB Behring LLC, 245 F.R.D. 328, 336 n.2 (N.D. Ill. 2006); Butler v. Corral, 1999 WL 1069246 *2 n.3 (N.D. Ill. Nov. 22, 1999), this argument could be treated as waived for purposes of being raised in a post-judgment motion. See Caisse Nationale de Credit Agricole v. CBI Industries, Inc., 90 F.3d 1264, 1270 (7th Cir. 1996); Stransky v. Cummins Engine Co., 51 F.3d 1329, 1336 (7th Cir. 1995); Publishers Resource, Inc. v. Walker-Davis Publications, Inc., 762 F.2d 557, 561 (7th Cir. 1985); Moore v. Cingular Wireless, 2005 WL 2989882 *1 (N.D. Nov. 3, 2005). Still it is within the court's discretion to consider arguments that could have been raised, but were not adequately argued by the litigant before judgment. See Sosebee v. Astrue, 494 F.3d 583, 589-90 (7th Cir. 2007); Stransky, 51 F.3d at 1336; In re UAL, Corp., 360 B.R. 780, 783-84 (Bankr. N.D. Ill. 2007). The arguments that plaintiff now raises regarding his accrued frozen benefits will be considered to the limited extent discussed below.

A whipsaw calculation only applied to cash balance pension plans. See IRS Notice 96-8, 1996-1 C.B. 359 (Feb. 5, 1996); Fry I, 2007 WL 2608524 at *1. Defendant contends that no whipsaw calculation applied to plaintiff's accrued frozen benefits because, following the conversion, those benefits remained part of a traditional pension plan distinct from the new cash balance plan. In accordance with rules applicable to traditional plans, those benefits were calculated to their present value based on a normal retirement age of 65. This is a matter of plan construction based on

the terms of the conversion as stated in the current Plan. Plaintiff, however, contends that it is a factual matter that the accrued frozen benefits were made part of the cash balance account as shown by the fact that he received consolidated statements covering both the accrued frozen benefits and the post-conversion benefits that accumulated in his cash balance account.

Presently, defendant contends that a determination of whether the accrued frozen benefits are benefits under a cash balance pension plan is a purely legal question based on construing terms of the Plan. That, however, is not an entirely accurate characterization of possible issues before this court. As contended by defendant in the initial motion to dismiss, there are administrative procedures for challenging determinations made by the Plan. See Plan § 10.2. The Plan is administered by a group of not less than three members known as the "Committee." Id. § 10.1(a). "The Committee shall have the duty and authority to interpret and construe the Plan in regard to all questions of eligibility, the status and rights of Participants, Beneficiaries and other persons under the Plan, and the manner, time, and amount of payment of any distribution under the Plan." Id. § 10.1(d). Construction of the Plan's terms by the Committee would be entitled to deferential review should any such decision be challenged in court by a participant. See Shyman v. Unum Life Insurance Co., 427 F.3d 452, 455 (7th Cir. 2005). Plaintiff affirmatively alleges in his complaint that he did not pursue administrative remedies. In Fry I, 2007 WL 2608524 at *2, plaintiff was not required to exhaust administrative remedies because the perceived issue before the court was a question of statutory interpretation--the meaning of normal retirement age--

for which no deference to the Plan was due. As now framed, though, the issue regarding accrued frozen benefits requires construction of Plan terms and possibly resolution of factual issues. The determination of those issues by the Plan would be entitled to deference. Therefore, the court declines resolving the issue of whether plaintiff was entitled to a whipsaw calculation in determining the amount of accrued frozen benefits he was entitled to receive. As to accrued frozen benefits, the judgment will be amended to expressly provide that plaintiff's claim is dismissed without prejudice. No opinion is expressed as to whether, at this time, plaintiff may still bring an administrative claim regarding those benefits. It is left to the Plan to resolve that issue in the first instance.

IT IS THEREFORE ORDERED that plaintiff's motion to alter or amend judgment [48] is granted in part and denied in part. The judgment entered on September 5, 2007 is vacated and the Clerk of the Court is directed to enter an amended judgment in favor of defendant and against named plaintiff (a) dismissing plaintiff Thomas Fry's claim for a whipsaw calculation with respect to defendant's Cash Balance Plan with prejudice, (b) dismissing plaintiff's claim for a whipsaw calculation with respect to his accrued frozen benefits without prejudice, and (c) dismissing the putative class claims without prejudice.

ENTER:

/s/
UNITED STATES DISTRICT JUDGE

DATED: DECEMBER 21, 2007

AO 450(rev. 5/85) Judgment in a Civil Case

United States District Court
Northern District of Illinois
Eastern Division

Case Number: 06 C 3723

[Filed December 21, 2007]

Thomas Fry	)
	)
v.	)
	)
Exelon Corporation Cash	)
Balance Pension Plan	)
	)

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the judgment entered on September 5, 2007 is vacated and an amended judgment is entered in favor of defendant Execlon Corporation Cash Balance Pension Plan and against named plaintiff Thomas Fry (a) dismissing plaintiff Thomas Fry's claim for a whipsaw calculation with respect to defendant's Cash Balance Plan with prejudice, (b) dismissing plaintiff's claim for a whipsaw

calculation with respect to his accrued frozen benefits without prejudice, and (c) dismissing the putative class claims without prejudice.

Michael W. Dobbins, Clerk of Court

/s/ Carol Wing, Deputy Clerk

Date: 12/21/2007

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 06 C 3723

[Filed August 31, 2007]

THOMAS FRY, and all others similarly situated,	)
Plaintiff,	)
v.	)
EXELON CORPORATION CASH BALANCE PENSION FUND,	)
Defendant.	)

MEMORANDUM OPINION AND ORDER

At issue in this case is whether, upon leaving employment, plaintiff Thomas Fry (and potentially others similarly situated) was entitled to a lump sum distribution from his "cash balance" retirement plan (defendant Exelon Corporation Cash Balance Pension Plan ("the Plan")) that included a "whipsaw calculation." See generally Berger v. Xerox Corp. Retirement Income Guarantee Plan, 338 F.3d 755,

757-63 (7th Cir. 2003); West v. AK Steel Corp., 484 F.3d 395, 399-401 (6th Cir. 2007). Whether Fry was entitled to a whipsaw calculation depends on the definition of "normal retirement age" as used in the Employee Retirement and Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq.

The "whipsaw calculation" has its origin in an IRS Notice directing that, in calculating a lump-sum distribution paid prior to normal retirement age, the value of a participant's account under certain cash balance plans must be projected to normal retirement age using the plan's interest crediting rate, then discounted back to its present value using a variable interest rate prescribed in the Internal Revenue Code. IRS Notice 96-8, 1996-1 C.B. 359, 360. If a plan's interest rate is higher than the statutory discount rate in effect at the time of payment, the resulting lump-sum benefit will be greater than the employee's account balance.

Participants who elected such lump-sum distributions thus received a windfall--a distribution reflecting future interest credits, which could then be invested by the participant and earn interest a second time. By contrast, participants who left their account balances in the plan until normal retirement age, or who requested payment at a time when the plan's projected investment rate was lower than the statutory discount rate, received interest only once. Whipsaw calculation also created an incentive for employers to offer low investment crediting rates to avoid such a result, thereby reducing pension benefits for all employees. See H.R. Rep. No. 109-232(II), at 127 (Dec. 6, 2005).

The Pension Protection Act of 2006 now allows cash balance plans to make distributions at any time based on participants' account balances without performing a whipsaw calculation. 29 U.S.C. § 1053(f) (2006). See also 26 U.S.C. § 411(a) (13) (2006). The Plan in this case preceded the Act and this provision is not applicable.

The parties agree that a participant in a cash balance plan is not entitled to a whipsaw calculation if he or she has already reached normal retirement age at the time of the event entitling him or her to a lump sum distribution. Article 2(21) of the Plan defines normal retirement age as "With respect to a Participant's Cash Balance Account, the earlier of (a) the date the Participant completes five years of Vesting Service and (b) the later of (i) the Participant's 65th birthday, and (ii) the fifth anniversary of the date the Participant commenced participation in the Plan." Named plaintiff Fry already had five years of vesting service when his employment ended, so defendant did not include a whipsaw calculation in his lump sum distribution. Plaintiff contends that, except for those who begin their pertinent employment after turning 60, "normal retirement age" under ERISA can only be a specified age and not a specified term of service. Since the Plan does not specify an age, plaintiff contends that the default age of 65 is deemed to be the normal retirement age for purposes of applying provisions of ERISA and the IRS Notice requiring a whipsaw calculation. Presently pending is defendant's motion to dismiss the complaint.[1]

---

[1] Defendant moved to dismiss before plaintiff moved for class certification. Plaintiff has not attempted to pursue class

For purposes of ERISA:

> (24) The term "normal retirement age" means the earlier of--
>
> (A) the time a plan participant attains normal retirement age under the plan, or
>
> (B) the later of --
>
> (I) the time a plan participant attains age 65, or
>
> (ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

29 U.S.C. § 1002(24).

Defendant contends that the fact that the statue measures normal retirement age based on service time supports that the measurement can be service time as defined in the Plan. Plaintiff contends subsection (A)'s use of "age" means that the measurement under that subsection must be an age, not a term of service. Under plaintiff's theory, because it is based on a term of service, "normal retirement age" as used in the Plan does not qualify as a "normal retirement age" as that term is used in § 1002(24)(A). If a plan does not itself specify a normal retirement age, plaintiff argues, normal retirement age for purposes of applying ERISA provisions, including any necessary whipsaw calculation, is age 65. See Geib v. New York State Teamsters Conference Pension & Retirement Fund, 758 F.2d 973 976-77 (3d Cir. 1985); Laurent v.

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certification while the motion has been pending. Class certification will be denied without prejudice and the claims of the putative class will be dismissed without prejudice.

PriceWaterhouseCoopers LLP, 448 F. Supp. 2d 537, 544, 547 (S.D.N.Y. 2006). Cf. Janowski v. International Brotherhood of Teamsters Local No. 710 Pension Fund 673 F.2d 931, 937 (7th Cir. 1982), vacated in part on other grounds, 463 U.S. 1222 (1983).

Before turning to the merits, defendant's contention that Fry's claim should be dismissed for failure to exhaust administrative remedies will be considered. Although exhaustion is an affirmative defense, it may be considered on defendant's motion to dismiss because plaintiff expressly alleges in the complaint that he did not pursue administrative remedies. See Engel v. Town of Roseland, 2006 WL 3513900 *3 (N.D. Ind. Dec. 5, 2006). Also, plaintiff concedes that exhaustion may be raised on a motion to dismiss.

ERISA does not have a statutory provision requiring exhaustion of administrative remedies prior to filing a lawsuit. See In re Household International Tax Reduction Plan, 441 F.3d 500, 502 (7th Cir. 2006). Courts, however, have the discretion to decline to consider ERISA claims that have not first been raised in administrative proceedings that were or still are available. See id.; Ames v. American National Can Co., 170 F.3d 751, 756 (7th Cir. 1999). Ordinarily, it is appropriate to require exhaustion. Ames, 170 F.3d at 756. Reasons for requiring exhaustion include: "the plan's own review process may resolve a certain number of disputes; the facts and the administrator's interpretation of the plan may be clarified for the purposes of subsequent judicial review; and an exhaustion requirement encourages private resolution of internal employment disputes." Id.

In the present case, there may have been a possibility of resolving this case during administrative proceedings, but there is no indication that either side was amenable to such a resolution. This is not a case where a factual dispute needs to be resolved nor is any interpretation of the Plan required. The dispute between the parties involves interpretation of a statute, not interpretation of the Plan. When interpretation of ERISA itself is the only issue, administrative exhaustion is not required. Donaldson v. Pharmacia Pension Plan, 435 F. Supp. 2d 853, 860-61 (S.D. Ill. 2006); Eaton v. Onan Corp., 117 F. Supp. 2d 812, 838-39 (S.D. Ind. 2000). This case will not be dismissed for failure to exhaust administrative remedies.

Turning to the merits, there is no conclusive statutory language or agency interpretation supporting one side or the other. Plaintiff contends that the use of "age" in subsection (A) should be read as requiring an age standard. That subsection, however, does not use "age" as a stand-alone term, but instead states "normal retirement age under the plan." Moreover, the statute references the "time" at which the participant attains normal retirement age, not the "age" at which the participant attains normal retirement age. While not conclusive, that leaves open the possibility that a plan could define "normal retirement age" based on years of service, just as § 1002(24) includes the possibility under subsection (B)(ii) of defining "normal retirement age" based on the non-age standard of participation anniversary. The use of "age" in subsection (A) does not unambiguously require that a plan define "normal retirement age" based on the participant's age.

Plaintiff relies on administrative interpretations as well. None of the cited regulations or Revenue Rulings are conclusive support. Revenue Ruling 78-120, 1978-1 C.B. 117, provides that a defined benefit pension plan can qualify under 26 U.S.C. § 401(a) even if it has a retirement age less than age 65.[2] While Rev. Rul. 78-120 states that a plan "may" specify any age under 65 as the normal retirement age, it does not state that normal retirement age must be stated as a specific age. Moreover, the issue it was addressing did not require determining if such a limitation applied.

In a supplementary submission,[3] plaintiff also cites to the Treasury Regulation amplifying on the Internal Revenue Code's (26 U.S.C. § 411 (a) (8)) definition of normal retirement age. The Internal Revenue Code's statutory definition is identical to the statutory definition contained in ERISA. The Treasury Regulation provides in part:

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[2] Revenue Ruling 78-120 cites an earlier Revenue Ruling (Rev. Rul. 71-147, 1971-1 C.B. 116) for the proposition that a normal retirement age under age 65 must be consistent with the age employees normally retire in the industry. In 1980, Rev. Rul. 71-147 (which concerns profit sharing plans) was superseded and it was no longer required that a retirement age under age 65 be consistent with customary practices in the industry. See Rev. Rul. 80-276, 1980-2 C.B. 131. Contrary to plaintiff's contention in his surreply, Rev. Rul. 80-276 does not state that normal retirement age under a plan must be defined by age.

[3] Plaintiff submitted this as a citation to supplemental authority even though it was not a new citation (like a new case) and had been previously cited by defendant in its reply. Nevertheless, the court granted leave to submit the citation and will consider the contentions that accompanied its submission.

(b) Normal retirement age- - (1) General rule. For the purposes of section 411 and the regulations thereunder, the term "normal retirement age" means the earlier of--

(i) The time specified by a plan at which a plan participant attains normal retirement age, or
(ii) The later of--
(A) The time the plan participant attains age 65, or
(B) The 10th anniversary of the date the plan participant commences participation in the plan.
. . . For purposes of subdivision (I) of this subparagraph, if an age is not specified by a plan as the normal retirement age then the normal retirement age under the plan is the earliest age beyond which the participant's benefits under the plan are not greater solely on account of his age or service.

26 C.F.R. 1.411(a) -7 (b)(2)

Relying on the last sentence, plaintiff contends this shows another measure must be used when no age is specified as a normal retirement age. Defendant essentially argues that the reference to a plan having no age specified as normal retirement age should be read as meaning a plan that has no provision for normal retirement age whatsoever. It would seem that, if intended to exclude definitions of normal retirement age that were based on time of service, the regulation would have more clearly and directly so stated. Even assuming the Plan at issue in this case is one in which no age is specified by the Plan as the normal retirement age, normal retirement age would

still be five years of service time. The alternative when no age is specified is the age at which benefits are not greater solely based on age or service. Plaintiff points to no provision in the Plan that, after vesting at five years of service, increases benefits because of age or service. Defendant points out that any increased benefits after five years of service are based on (a) additional contributions based on a percentage of compensation earned or (b) interest earned on existing amounts. Plaintiff points to no contrary provision. Thus, even using the alternative measurement of normal retirement age contained in the regulation, normal retirement age under the Plan could occur at the completion of five years of service.

Plaintiff also relies on Laurent, 448 F. Supp. 2d at 545-46. Laurent primarily relies on the holding in Duchow v. New York State Teamsters Conference Pension & Retirement Fund, 691 F.2d 74 (2d Cir. 1982), cert. denied, 461 U.S. 918 (1983). In Duchow, the Second Circuit followed the plain language of 29 U.S.C. § 1053(a) in holding that a plan must provide that pension benefits can vest either by reaching normal retirement age or by satisfying one of the three service requirements then set forth in § 1053(a)(2). Id. at 77-79. In emphasizing that normal retirement age and these vesting requirements are distinct, the Second Circuit made the point that the former is an age requirement independent of service time while the latter requirements were all based on service time. See id. at 78. Whether, consistent with § 1002(24)(A), normal retirement age could be measured by service time was not an issue before the court. The statement that normal retirement age is independent of service time was dictum; the court otherwise held that the plain language of the statute (as well as its purpose

and legislative history) required that either reaching normal retirement age or satisfying a provision of § 1053(a)(2) be sufficient for vesting. See Duchow, 691 F.2d at 78-79. "In sum, we conclude that the language, history and purposes of ERISA point forcefully to the conclusion that the first clause of § 203(a) imposes a vesting requirement that is independent of the service-period vesting standards imposed in § 203(a)(2)." Id. at 79. Also at issue in Duchow was whether the then 10th-anniversary requirement of § 1002(24)(B)(ii) meant 10 years after starting employment or 10 years of actual service. In holding that it meant the former, the Second Circuit again noted the dichotomy between the service-time standards and the normal retirement age standard. Duchow, 691 F.2d at 80. Again, that is dictum since the plain meaning of anniversary is a recurring date, not a requirement of continuous work or employment. Id. at 79-80.

While the dictum in Duchow provides some support for the holding in Laurent, it is weak support since the Duchow case did not actually address the issue of a normal retirement date based on service time, which is the primary issue raised in the pending motion and also a central issue in the Laurent case. Because Duchow is dictum, the statutory language[4] and any relevant administrative interpretations must be considered. As discussed above, the Revenue Rulings and regulations cited by plaintiff do not support plaintiff's position.

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[4] Neither party contends there is legislative history that clarifies the meaning of the statute.

Laurent, 448 F. Supp. 2d at 545, also cites Deak v. Masters, Mates & Pilots Pension Plan, 821 F.2d 572, 575 n.5 (11th Cir. 1987), cert. denied, 484 U.S. 1005 (1988), but that case only states that normal retirement age is a term of art under ERISA without discussing its actual meaning. Additionally, Laurent cites Rev. Rul. 78-120. See Laurent, 448 F. Supp. 2d at 546 (misciting it as Rev. Rul. 78-20). Laurent states that, in that Ruling, "I.R.S. described normal retirement age as a 'certain specified age.'" The quoted language from the Revenue Ruling, however, was describing the provisions of the particular plan that was the subject of the Revenue Ruling, it was not describing plans or normal retirement age in general. Laurent's stated reliance on Rev. Rul. 78-120 is misplaced.

For the foregoing reasons, Laurent is not found to be persuasive.

Other cases are cited in support of defendant's position: In Nichols v. Board of Trustees of Asbestos Workers Local 24 Pension Plan, 1 E.B.C. (BNA) 1868 (D.D.C. Feb. 23, 1979), the court held that a plan provision providing for an unreduced "normal pension" with 25 years of service at any age meant that 25 years of service constituted normal retirement age as that term is used in § 1002(24). The court cited a pre-ERISA Revenue Ruling that states normal retirement age is the lowest age specified in a plan at which an employee can retire without permission and at the full rate for service already performed. See Nichols, 1 E.B.C. at 1870 (citing Rev. Rul. 78-446, 1971-2 C.B. 187). Since the plaintiffs in the case qualified for an unreduced pension with 25 years of service even though they were under the age 65

requirement that they would have to meet with less service time, the court determined that was the youngest age at which they could retire with unreduced benefits and therefore constituted normal retirement age for those plaintiffs. Id. at 1870. The court also cited Rev. Rul. 78-120 as involving essentially the same situation as in Nichols.[5] Thus Nichols holds that a retirement provision based on a term of service may constitute normal retirement age. Positively citing Nichols, the Third Circuit held that an employee who qualified for "normal retirement" prior to age 65 because he had 25 years of service had reached normal retirement age and therefore had accrued benefits. See Ryan v. Asbestos Workers Union Local 42 Pension Fund, 27 F. App'x 100 (3d Cir. 2002).[6]

There are no controlling nor compelling precedents on the issue before the court. While the language of § 1002(24)(A) is open to interpretation, the better reading is that a plan may set a time (prior to the employee reaching age 65) that will qualify as normal retirement age, either by setting a specific age, a period of service or participation, or a combination of age and service/participation. In this case, that means that named plaintiff, who had more than five years of qualifying service, had reached normal retirement age

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[5] Although not specifically noted by the Nichols court, Rev. Rul. 78-120 cites now-superseded Rev. Rul. 71-147 for the proposition that normal retirement age is the earliest age at which a participant can retire with unreduced benefits.

[6] Although not precedential, unpublished Third Circuit opinions may be cited for their persuasive value. 3d Cir. Internal Operating Proc. 5.7; Spencer v. Wal-Mart Stores, Inc., 2005 WL 3654381 *3 n.4 (D. Del. June 24, 2005).

at the time he retired. Therefore, he was not entitled to an additional distribution based on a whipsaw calculation.

Plaintiff also has Accrued Frozen Benefits that he had accrued in a traditional retirement plan prior to its conversion to the cash balance plan. The five-year service rule does not apply to those benefits. In response to the motion to dismiss, plaintiff contends he is at least entitled to a whipsaw calculation for those benefits. In its reply, defendant responds that age 65 retirement was already used in determining how much was in that account. In his surreply, plaintiff does not dispute that representation. To the extent there is an actual dispute about how the Accrued Frozen Benefit was calculated, plaintiff should first invoke administrative proceedings since it would involve a dispute about how the plan was administered. It appears, however, that defendant has accurately represented that the Accrued Frozen Benefit is already calculated based on an age 65 retirement and therefore an additional whipsaw calculation is not required. Plaintiff's individual claim will be dismissed in its entirety.

IT IS THEREFORE ORDERED that defendant's motion to dismiss [21] is granted. The Clerk of the Court is directed to enter judgment in favor of defendant and against named plaintiff Thomas Fry dismissing plaintiff's cause of action with prejudice and dismissing the putative class claims without prejudice.

ENTER :

/s/ William T. Hart
UNITED STATES DISTRICT JUDGE

DATED: AUGUST 31, 2007

AO 450(rev. 5/85) Judgment in a Civil Case

United States District Court
Northern District of Illinois
Eastern Division

Case Number: 06 C 3723

[Filed August 31, 2007]

Thomas Fry	)
	)
v.	)
	)
Exelon Corporation Cash	)
Balance Pension Plan	)
	)

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that defendants' motion do dismiss is granted. Judgment is entered in favor of defendant Exelon Corporation Cash Balance Pension Plan and against named plaintiff Thomas Fry dismissing plaintiff's cause of action with prejudice and dismissing the putative class claims without prejudice.

Michael W. Dobbins, Clerk of Court

/s/ Carol Wing, Deputy Clerk

Date: 8/31/2007

APPENDIX F

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 30, 2009

BEFORE:

FRANK H. EASTERBROOK, *Chief Judge*

TERENCE T. EVANS, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 08-1135

THOMAS FRY, *Plaintiff-Appellant*,	)
v.	)
EXELON CORPORATION CASH BALANCE PENSION PLAN, *Defendant-Appellee.*	)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 06 C 3723
William T. Hart, *Judge*.

Order

Plaintiff-appellant filed a petition for rehearing and rehearing en banc on July 15, 2009. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX G

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9325]

RIN 1545-BD23

Distributions From a Pension Plan Upon Attainment of Normal Retirement Age

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under sections 401(a) and 411(d)(6) of the Internal Revenue Code. These regulations provide rules permitting distributions to be made from a pension plan upon the attainment of normal retirement age prior to a participant's severance from employment with the employer maintaining the plan. These regulations provide the public with guidance regarding distributions from qualified pension plans and will affect administrators of, and participants in, such plans.

DATES: *Effective Date:* These regulations are effective May 22, 2007.

Applicability Dates: These regulations are generally applicable May 22, 2007. For dates of applicability, see §§ 1.401(a)–1(b)(4) and 1.411(d)–4, A–12(a).

FOR FURTHER INFORMATION CONTACT: Cathy A. Vohs at (202) 622-6090 or Janet A. Laufer at (202) 622-6080 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 401(a) sets forth the qualification requirements for a trust forming part of a stock bonus, pension, or profit-sharing plan of an employer. Several of these qualification requirements are based on a plan's normal retirement age. Section 411(a)(8) defines the term "normal retirement age" as the earlier of (a) the time a participant attains normal retirement age under the plan or (b) the later of the time a plan participant attains age 65 or the 5th anniversary of the time a plan participant commenced participation in the plan.

The definition of normal retirement age is important in applying the rules under section 411(b) which are designed to preclude avoidance of the minimum vesting standards through the backloading of benefits (for example, a benefit formula under which the rate of benefit accrual is increased disproportionately for employees with longer service) because those rules are based on the benefit payable at normal retirement age. Normal retirement age is also relevant for applying the rules relating to suspension of benefits under section 411(a)(3)(B) and the rules under section 411(b)(1)(H)(iii) that permit a plan to

offset accruals after normal retirement age by either the actuarial value of distributions made after normal retirement age or the actuarial value of increases in the benefits due to delay in payment. Normal retirement age is also used in determining the minimum benefit for non-key employees in the case of a top-heavy defined benefit plan. See section 416(c)(1)(A) and (E). Also, the vesting requirements of sections 401(a)(7) and 411 are based upon normal retirement age.

Section 411(d)(6) generally prohibits a qualified plan from being amended to reduce a participant's accrued benefit and, for this purpose, an elimination or reduction of an early retirement benefit or a retirement-type subsidy, or an elimination of an optional form of benefit, is treated as a reduction in the accrued benefit. The Secretary has the authority under section 411(d)(6) to allow amendments that eliminate an optional form of benefit.

Section 401(a) permits three types of plans to qualify under section 401(a): Stock bonus, pension, and profit-sharing plans. Section 1.401–1(a)(2)(i) and (b)(1)(i) of the Income Tax Regulations interprets what it means to be a "pension plan," and has done so since the publication of those regulations as TD 6203 (1956–2 CB 219) (see § 601.601(d)(2)(ii)(b)). These regulations (the 1956 regulations) provide that a qualified plan under section 401(a) is a program and arrangement which is established and maintained by an employer "in the case of a pension plan, to provide for the livelihood of the employees or their beneficiaries after the retirement of such employees through the payment of benefits determined without

regard to profits."[1] The 1956 regulations defining a qualified pension plan further provide that a pension plan must be "a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement."

Following the enactment of the Employee Retirement Income Security Act of 1974 (ERISA), 93 Public Law 406 (88 Stat. 829), the regulations under section 401(a) were modified to provide that the 1956 regulations continued to apply, except as otherwise provided. See § 1.401(a)–1(b)(1)(i) and (ii). Accordingly, a pension plan is generally not permitted to pay benefits before retirement. See also Rev. Rul. 56–693 (1956–2 CB 282), as modified by Rev. Rul. 60–323 (1960–2 CB 148) (see § 601.601(d)(2)(ii)(b)).

Rev. Rul. 71–24 (1971–1 CB 114) (see § 601.601(d)(2)(ii)(b)) provides guidance for the treatment of benefits under a pension plan for employees who continue employment after normal retirement age. Rev. Rul. 71–24 includes an example that indicates that benefits are permitted to commence during employment after normal retirement age.

Rev. Rul. 71–147 (1971–1 CB 116) (see § 601.601(d)(2)(ii)(b)) provides that the normal retirement age in a pension or annuity plan is

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[1] This rule is limited to a pension plan, which is either a defined benefit plan or a defined contribution plan that is not a stock bonus or profit-sharing plan (generally referred to as a money purchase pension plan). Other rules apply to stock bonus plans and profit-sharing plans.

generally the lowest age specified in the plan at which the employee has the right to retire without the consent of the employer and receive retirement benefits based on the amount of the employee's service on the date of retirement at the full rate set forth in the plan (that is, without actuarial or similar reduction because of retirement before some later specified age). While ordinarily the normal retirement age under pension and annuity plans is age 65, Rev. Rul. 71–147 permitted a different age to be specified, but an age lower than 65 was permitted only if the age represented the age at which employees customarily retire in the particular company or industry, and was not a device to accelerate funding.

Following the enactment of section 411(a)(8) (defining normal retirement age as described earlier in this preamble) under ERISA, Rev. Rul. 71–147 was modified by Rev. Rul. 78–120 (1978–1 CB 117) (see § 601.601(d)(2)(ii)(b)). Under Rev. Rul. 78–120, for purposes of section 411, a pension plan is permitted to have a normal retirement age lower than age 65, regardless of the age at which employees customarily retire in the particular company or industry.

Section 401(a)(36), added by section 905(b) of the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780) (PPA '06), provides that a trust forming part of a pension plan is not treated as failing to constitute a qualified trust under section 401(a) solely because the plan provides that a distribution may be made from such trust to an employee who has attained age 62 and who is not separated from employment at the time of such distribution. Section 401(a)(36) applies to distributions in plan years beginning after December 31, 2006.

On November 10, 2004, a notice of proposed rulemaking (REG-114726–04) under section 401 was published in the **Federal Register** (69 FR 65108) (the proposed regulations). The proposed regulations would have allowed in-service distributions after normal retirement age, but would not have permitted a normal retirement age to be set so low as to be a subterfuge to avoid qualification requirements. The proposed regulations would also have permitted in-service distributions before normal retirement age under a bona fide phased retirement program.

On March 14, 2005, the IRS held a public hearing on the proposed regulations. Written comments responding to the notice of proposed rulemaking were also received. In light of the enactment of section 401(a)(36) by PPA '06, only portions of the proposed regulations are being finalized at this time. The IRS recently issued a notice requesting comments as to whether the portions of the proposed regulations relating to in-service distributions pursuant to a bona fide phased retirement program should be finalized. See Notice 2007–8 (2007–3 IRB 276) (see § 601.601(d)(2)(ii)(b)). The portions of the proposed regulations relating to normal retirement age and in-service distribution upon attainment of normal retirement age are being finalized by this Treasury Decision. The significant revisions to the proposed regulations are discussed in this preamble.

Explanation of Provisions and Summary of Comments

I. Overview

This Treasury Decision modifies existing regulations, including the regulations at § 1.401(a)–1 which generally require a pension plan to be maintained primarily to provide systematically for the payment of definitely determinable benefits after retirement. These regulations provide two exceptions to this rule. First, they clarify that a pension plan is permitted to commence payment of retirement benefits to a participant after the participant has attained normal retirement age. The regulations also provide rules on how low a plan's normal retirement age is permitted to be and include a related exception to the anti-cutback rules of section 411(d)(6) to allow conforming amendments during a transitional period. Second, the regulations reflect the provisions of new section 401(a)(36).

II. Normal Retirement Age

A. In General

These regulations adopt the rule of the proposed regulations under which a pension plan (a defined benefit plan or money purchase pension plan) is permitted to pay benefits upon an employee's attainment of normal retirement age, even if the employee has not yet had a severance from employment with the employer maintaining the plan. Comments generally supported the inclusion of this rule as reflecting existing practice among some

pension plans, based on an example in Rev. Rul. 71–24.

These regulations also include rules restricting a plan's normal retirement age. The proposed regulations would have provided that a plan's normal retirement age could not be set so low as to be a subterfuge to avoid the requirements of section 401(a), and, accordingly, normal retirement age could not be earlier than the earliest age that is reasonably representative of a typical retirement age for the covered workforce.[2] Some comments expressed concern about the specifics of this rule, including concern about how it might be applied in various circumstances, and suggested that the regulations contain a safe harbor for which there would be no need for a demonstration of the typical retirement age for the covered workforce.

These final regulations modify the proposed regulations to replace the subterfuge standard with a requirement that the normal retirement age under a plan be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed. To address comments about the need for a safe harbor age, these regulations provide that a normal retirement age of at least age 62 is deemed to be not earlier than the typical retirement age for the industry in which the covered workforce is employed. Thus, a plan satisfies this safe harbor if its

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[2] The preamble to the proposed regulations noted that, while a low normal retirement age may have a significant cost effect on a traditional defined benefit plan, this effect is not as significant for defined contribution plans or for certain hybrid defined benefit plans.

normal retirement age is age 62, or if its normal retirement age is the later of age 62 or another specified date, such as the later of age 62 or the fifth anniversary of plan participation. However, a plan that is subject to section 411 cannot provide for a normal retirement age that is later than the later of the time the participant attains age 65 or the fifth anniversary of the time the participant commenced participation in the plan. See section 411(a)(8)(B).

If a plan's normal retirement age is earlier than age 62, the determination of whether the age is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed is based on all of the relevant facts and circumstances. If the normal retirement age is between ages 55 and 62, then it is generally expected that a good faith determination of the typical retirement age for the industry in which the covered workforce is employed that is made by the employer (or, in the case of a multiemployer plan, made by the trustees) will be given deference, assuming that the determination is reasonable under the facts and circumstances. However, a normal retirement age that is lower than age 55 is presumed to be earlier than the earliest age that is reasonably representative of the typical retirement age for the industry of the relevant covered workforce absent facts and circumstances that demonstrate otherwise to the Commissioner.

In the case of a plan where substantially all of the participants in the plan are qualified public safety employees (within the meaning of section 72(t)(10)(B), as added by section 828 of PPA '06), a normal retirement age of age 50 or later is deemed not to be

earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed. Under section 72(t)(10)(B), a qualified public safety employee means any employee of a State or political subdivision of a State who provides police protection, firefighting services, or emergency medical services for any area within the jurisdiction of such State or political subdivision.

B. Section 411(d)(6) Relief

These regulations include an amendment to the existing regulations under section 411(d)(6) to permit a plan to be amended during a transition period to conform to the rules concerning normal retirement age. Thus, a plan amendment that changes the normal retirement age under the plan to a later normal retirement age (pursuant to these regulations) does not violate section 411(d)(6) merely because the amendment eliminates a right to an in-service distribution prior to the amended normal retirement age. However, this rule does not provide any other relief. For example, this rule does not permit the amendment to reduce benefits in some other manner that fails to satisfy section 411(d)(6). Neither does the rule provide relief under section 411(a)(9) (requiring that the normal retirement benefit not be less than the greater of any early retirement benefit payable under the plan or the benefit under the plan commencing at normal retirement age), section 411(a)(10) (if the amendment changes the plan's vesting rules), or section 4980F (or section 204(h), the parallel provision of ERISA) (relating to amendments that reduce the rate of future benefit accrual). See also Rev. Rul.

81–210 (1981–2 CB 89) (see § 601.601(d)(2)(ii)(b)). An example is included to illustrate this rule.

Effective Dates

These regulations are generally applicable May 22, 2007. In the case of a governmental plan (as defined in section 414(d)), these regulations apply with respect to plan years beginning on or after January 1, 2009. In the case of a plan maintained pursuant to one or more collective bargaining agreements that have been ratified and are in effect on May 22, 2007, these regulations do not apply before the first plan year that begins after the last of the agreements terminates determined without regard to any extension thereof (or, if earlier, May 24, 2010.

A provision of a plan that results in the failure of the plan to satisfy § 1.401(a)–1(b)(2) or (3) is a disqualifying provision described in § 1.401(b)–1(b)(3)(i). Therefore, the remedial amendment period rules of § 1.401(b)–1 apply. For example, in the case of a plan with a calendar plan year that is maintained by an employer with a calendar taxable year (and the plan is not a governmental plan and is not maintained pursuant to a collective bargaining agreement), the plan's remedial amendment period with respect to § 1.401(a)–1(b)(2) and (3) ends on the date prescribed by law for the filing of the employer's income tax return (including extensions) for the 2007 taxable year.

In the case of a plan amendment that increases the plan's normal retirement age pursuant to this regulation, the amendment may also eliminate a right to an in-service distribution prior to the normal

retirement age under the plan as amended without violating section 411(d)(6) if the amendment is adopted after May 22, 2007 and on or before the last day of the applicable remedial amendment period under § 1.401(b)–1 with respect to the requirements of § 1.401(a)–1(b)(2) and (3). For purposes of section 1107 of PPA '06, such an amendment is not made pursuant to PPA '06 and is not made pursuant to any regulation issued under PPA '06.

Special Analyses

It has been determined that this Treasury Decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information requirement upon small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Christopher A. Crouch (formerly of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities)), Cathy A. Vohs and Janet A. Laufer of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from

the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.401(a)–1 also issued under 26 U.S.C. 401.
* * *

■ **Par. 2.** Section 1.401(a)–1 is amended by:

■ 1. Revising paragraph (b)(1)(i).

■ 2. Adding paragraphs (b)(2), (b)(3), and (b)(4).

■ The additions and revision read as follows:

§ 1.401(a)–1 Post-ERISA qualified plans and qualified trusts; in general.

* * * * *

(b) * * *

(1) * * *

(i) In order for a pension plan to be a qualified plan under section 401(a), the plan must be established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to its employees over a period of years, usually for life, after retirement or attainment of normal retirement age (subject to paragraph (b)(2) of this section). A plan does not fail to satisfy this paragraph (b)(1)(i) merely because the plan provides, in accordance with section 401(a)(36), that a distribution may be made from the plan to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

* * * * *

(2) *Normal retirement age*—(i) *General rule.* The normal retirement age under a plan must be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

(ii) *Age 62 safe harbor.* A normal retirement age under a plan that is age 62 or later is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

(iii) *Age 55 to age 62.* In the case of a normal retirement age that is not earlier than age 55 and is

earlier than age 62, whether the age is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed is based on all of the relevant facts and circumstances.

(iv) *Under age 55.* A normal retirement age that is lower than age 55 is presumed to be earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed, unless the Commissioner determines that under the facts and circumstances the normal retirement age is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

(v) *Age 50 safe harbor for qualified public safety employees.* A normal retirement age under a plan that is age 50 or later is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed if substantially all of the participants in the plan are qualified public safety employees (within the meaning of section 72(t)(10)(B)).

(3) *Benefit distribution prior to retirement.* For purposes of paragraph (b)(1)(i) of this section, retirement does not include a mere reduction in the number of hours that an employee works. Accordingly, benefits may not be distributed prior to normal retirement age solely due to a reduction in the number of hours that an employee works.

(4) *Effective date.* Except as otherwise provided in this paragraph (b)(4), paragraphs (b)(2) and (3) of this

section are effective May 22, 2007. In the case of a governmental plan (as defined in section 414(d)), paragraphs (b)(2) and (3) of this section are effective for plan years beginning on or after January 1, 2009. In the case of a plan maintained pursuant to one or more collective bargaining agreements that have been ratified and are in effect on May 22, 2007, paragraphs (b)(2) and (3) of this section do not apply before the first plan year that begins after the last of such agreements terminate determined without regard to any extension thereof (or, if earlier, May 24, 2010. See § 1.411(d)–4, A–12, for a special transition rule in the case of a plan amendment that increases a plan's normal retirement age pursuant to paragraph (b)(2) of this section.

■ **Par. 3.** Section 1.411(d)–4 is amended by adding Q&A–12 as follows:

§ 1.411(d)–4 Section 411(d)(6) protected benefits.

* * * * *

Q–12. Is there a transition period during which a plan is permitted to eliminate a right to in-service distributions in connection with an amendment to ensure that the plan's normal retirement age satisfies the requirements of § 1.401(a)–1(b)(2)?

A–12. (a) *In general.* A plan amendment that changes the normal retirement age under the plan to a later normal retirement age pursuant to § 1.401(a)–1(b)(2) does not violate section 411(d)(6) merely because it eliminates a right to an in-service distribution prior to the amended normal retirement age. However, this paragraph does not provide relief

from any other applicable requirements; for example, this relief does not permit the amendment to violate section 411(a)(9) (requiring that the normal retirement benefit not be less than the greater of any early retirement benefit payable under the plan or the benefit under the plan commencing at normal retirement age), section 411(a)(10) (if the amendment changes the plan's vesting rules), section 411(d)(6) (other than elimination of the right to an in-service distribution prior to the amended normal retirement age), or section 4980F (relating to an amendment that reduces the rate of future benefit accrual). This paragraph only applies to a plan amendment that is adopted after May 22, 2007 and on or before the last day of the applicable remedial amendment period under § 1.401(b)–1 with respect to the requirements of § 1.401(a)–1(b)(2) and (3).

(b) *Example.* The following example illustrates the application of this section:

(i) *Facts.* (A) Plan A is a defined benefit plan intended to be qualified under section 401(a). Plan A is maintained by a calendar year taxpayer and has a normal retirement age that is age 45. For employees who cease employment before normal retirement age with a vested benefit, Plan A permits benefits to commence at any date after the attainment of normal retirement age through attainment of age 70 ½ and provides for benefits to be actuarially increased to the extent they commence after normal retirement age. For employees who continue employment after attainment of normal retirement age, Plan A provides for benefits to continue to accrue and permits benefits to commence at any time, with an actuarial increase in benefits to apply to the extent benefits do not

commence after normal retirement age. Age 45 is an age that is earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

(B) On February 18, 2008, Plan A is amended, effective May 22, 2007, to change its normal retirement age to the later of age 65 or the fifth anniversary of participation in the plan. The amendment provides full vesting for any participating employee who is employed on May 21, 2007, and who terminates employment on or after attaining age 45. The amendment provides employees who cease employment before the revised normal retirement age and who are entitled to a vested benefit with the right to be able to commence benefits at any date from age 45 to age 70 ½ . The plan amendment also revises the plan's benefit accrual formula so that the benefit for prior service (payable commencing at the revised normal retirement age or any other age after age 45) is not less than would have applied under the plan's formula before the amendment (also payable commencing at the corresponding dates), based on the benefit accrued on May 21, 2007, and provides for service thereafter to have the same rate of future benefit accrual. Thus, for any participant employed on May 21, 2007, with respect to benefits accrued for service after May 21, 2007, the amount payable under the plan (as amended) at any benefit commencement date after age 45 is the same amount that would have been payable at that benefit commencement date under the plan prior to amendment. The plan amendment also eliminates the right to an in-service distribution between age 45 and the revised normal retirement age. Plan A has been operated since May

22, 2007, in conformity with the amendment adopted on February 18, 2008.

(ii) *Conclusion.* The plan amendment does not violate section 411(d)(6). Although the amendment eliminates the right to commence benefits in-service between age 45 and the revised normal retirement age, the amendment is made before the last day of the remedial amendment period applicable to the plan under § 1.401(b)–1 with respect to the requirements of § 1.401(a)–1(b)(2) and (3), and therefore the amendment is permitted under paragraph (a) of this A–12. Further, the amendment does not result in a reduction in any benefit for service after May 22, 2007.

Thus, the amendment does not result in a reduction in any benefit for future service, and advance notice of a significant reduction in the rate of future benefit accrual is not required under section 4980F.

Kevin M. Brown,

Deputy Commissioner for Services and Enforcement.

Approved: May 9, 2007.

Eric Solomon,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. E7–9643 Filed 5–21–07; 8:45 am]

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APPENDIX H

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July 22, 2009

Fry v. Exelon: How Will the IRS React?

In *Fry v. Exelon Corporation Cash Balance Plan*, 571 F.3d 644 (7th Cir. 2009) (Easterbrook, J.), the Seventh Circuit affirmed a district court's conclusion that an employer may define the "normal retirement age" of employees participating in the company's pension plan as the completion date of a stated number of years of service rather than attainment of a specified age such as "age 62." This came as welcome news to cash balance plan sponsors who had adopted service-based retirement ages as a means of complying with IRS Notice 96-8. However, significant risk and uncertainty remains.

The problem is that the IRS does not agree with, and is unlikely to follow, the Seventh Circuit's holding. Following publication of the *Fry* district court decision in 2007, the IRS continued its practice of challenging cash balance plans identified on audit that define normal retirement age by reference to years of service. Revenue agent reports issued in connection with these audits made it clear that field agents were following an IRS National Office directive on the issue. For instance, take the following IRS audit report issued to a cash balance plan sponsor in June 2008, challenging the validity of a normal retirement age defined as the earlier of 2 years of service or age 65:

> The Government believes that the Plan does not contain a valid "normal retirement age" [and] therefore does not meet the requirements of IRC 411(a)(8) and IRC 401(a)(7). In *Laurent v. Price Waterhouse Coopers LLP* the court ruled a normal retirement age "cannot be defined in reference to years of service." [T]he Plan's reference to only "two years of service" cannot be held to be a valid retirement age. Revenue Ruling 78-120 also requires that a participant must reach a "certain specified age." This Plan does not require such and therefore does not contain a valid retirement age. We believe the [district] court in *Fry v. Exelon* erred.

Revenue Agent's Report (Form 886-A), June 2008.

There is little reason to believe that the Seventh Circuit's affirmance of the *Fry* district court decision will cause the IRS to change its position. The IRS has never felt itself bound by a single Circuit Court decision, and is particularly unlikely to defer to a

decision that did not take into account – because the court no doubt was not aware of – the IRS's position.

In fact, the IRS seemingly has little choice but to stand by its position that *Fry* was wrongly decided. The Seventh Circuit held that the ERISA statute imposes no constraints on the manner in which a plan sponsor may define "normal retirement age" under the plan. Yet the IRS has issued regulations that condition tax qualification under Code § 401 on a pension plan's agreement to use a normal retirement age that is "not earlier than the earliest retirement age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed." *See* Treas. Reg. § 1.401(a)-1(b)(2)(i). If Judge Easterbrook is correct that the statute does not include any constraints on the manner in which a plan may define "normal retirement age," these regulations are invalid – even prospectively. *See, e.g., Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference . . . if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion").

No. 09-532

IN THE

Supreme Court of the United States

THOMAS FRY,

Petitioner,

v.

EXELON CORPORATION
CASH BALANCE PENSION PLAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT EXELON CORPORATION CASH BALANCE PENSION PLAN'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Seventh Circuit, in determining whether petitioner was entitled to a so-called "whipsaw" calculation with respect to his pension benefit from the Exelon Plan, properly interpret 29 U.S.C. § 1002(24) — which defines "normal retirement age" as "the time a plan participant attains normal retirement age under the plan" — to permit the Exelon Plan, as of 2003, to define "normal retirement age" as "the date the Participant completes five years of Vesting Service," instead of applying the interpretation set forth in a 2007 regulation that was adopted after the statute was amended to abolish the "whipsaw" calculation and that changed prior agency interpretations of the statute on an expressly prospective basis?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6, the Exelon Corporation Cash Balance Pension Plan states that it has no parent company and that no publicly traded company owns more than 10% of its stock.

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THOMAS FRY,

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT EXELON CORPORATION CASH BALANCE PENSION PLAN'S BRIEF IN OPPOSITION

The Exelon Corporation Cash Balance Pension Plan ("Exelon Plan") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Thomas Fry.

COUNTERSTATEMENT OF THE CASE

The decision below (1) interprets a statutory and regulatory scheme that is no longer in effect, (2) neither invalidates nor disregards any agency regulation, and (3) creates no conflict among federal courts of appeals. Nothing decided by the court below or asserted in the petition warrants this Court's review.

I. The Facts

The Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"), recognizes two kinds of pension plans: defined contribution plans and defined benefit plans. A defined contribution or "individual account" plan, such as a 401(k) plan, "provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account," adjusted for gains, losses, income, and expenses. *Id.* § 1002(34). A defined benefit plan is "a pension plan other than an individual account plan." *Id.* § 1002(35).

The Exelon Plan is a "cash balance plan," which is a form of defined benefit plan that "works like a defined-contribution plan, except that the individual accounts are virtual." Pet. App. 2a. A cash balance plan uses hypothetical bookkeeping accounts that represent the pension benefit of each participant. As with a defined contribution plan, participants in the Exelon Plan are entitled to a lump-sum distribution of their benefits when they quit or retire. *Id.* Petitioner Fry left Exelon in 2003, when he was 55 years old, and received a lump-sum distribution equal to the value of his cash balance account — more than $500,000. *Id.* at 4a.

This litigation focuses on how that lump-sum distribution was calculated. When a participant in a defined contribution plan retires or resigns, he or she is entitled to receive the balance of the account. 29 U.S.C. § 1002(23)(B). In 2003, when Fry left Exelon, the calculation of benefits under cash balance plans was not quite so simple. Although the law has since changed, in 2003 defined benefit plans (including cash balance plans) were subject to different rules intended to ensure that any distribution of benefits

prior to "normal retirement age" would be actuarially equivalent to the value of those benefits if they were received at or after "normal retirement age." *See* Pet. App. 2a.

At the time of petitioner's resignation, certain lump-sum distributions from cash balance plans therefore were subject to what has been termed a "whipsaw" calculation. If a participant in a cash balance plan quit or retired before "normal retirement age," as defined in 29 U.S.C. § 1002(24), then the proper lump-sum distribution was the value of his hypothetical account projected forward to normal retirement age (with the balance being increased in accordance with the plan's investment crediting rate), then discounted back to present value (using a discount rate prescribed in the Internal Revenue Code). *See* Pet. App. 28a; *see also Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 759-60 (7th Cir. 2003). Because of this calculation, if a plan's investment crediting rate exceeded the statutory discount rate, the lump-sum distribution would be higher than the balance of the participant's hypothetical account.

Petitioner claims in this litigation that he resigned before his normal retirement age, and was thus entitled to have his lump-sum distribution increased based on a whipsaw calculation. That claim turns on the definition of normal retirement age. "Normal retirement age" is defined in ERISA to be:

> the earlier of—
>
> (A) the time a plan participant attains normal retirement age under the plan, or
>
> (B) the later of —

> (i) the time a plan participant attains age 65, or
>
> (ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

29 U.S.C. § 1002(24). Pursuant to section 1002(24)(A), the Exelon Plan defined normal retirement age as the earlier of, on the one hand, "the date the Participant completes five years of Vesting Service" and, on the other, the later of the participant's 65th birthday and "the fifth anniversary of the date the Participant commenced participation in the Plan." Pet. 7.

Petitioner does not dispute that, at the time of his resignation, he had reached normal retirement age according to this plan definition. Petitioner argues instead that the Exelon Plan's definition of normal retirement age was outside the bounds of the statute. He contends that a plan's normal retirement age must be a single chronological "age" (such as age 65) that is the "normal" age for retirement in the relevant industry, and cannot be defined by reference to a period of service. *See* Pet. 16-21. Both the district court and the Seventh Circuit rejected the contention that the statute imposed any such restriction on a plan's definition of normal retirement age.

In 2006, long after Fry's resignation from Exelon and receipt of the lump-sum distribution from the Exelon Plan, Congress enacted the Pension Protection Act of 2006, which abolished the whipsaw calculation for cash balance plans for periods after the Act's August 17, 2006 effective date. 29 U.S.C. § 1053(f)(1)(B). In 2007, as part of a policy change permitting phased retirements and retirement plan distributions while participants are still employed (*see* Pet. App. 19a), the Treasury Department adopted

new regulations that require that plans' definitions of normal retirement age correspond to the age when participants customarily retire. 26 C.F.R. § 1.401(a)-1(b)(2). The Treasury Department, noting that it had previously ruled that a plan could define normal retirement age "regardless of the age at which employees customarily retire," Distributions from a Pension Plan Upon Attainment of Normal Retirement Age, 72 Fed. Reg. 28,604, 28,604 (May 22, 2007), expressly made its new regulations prospective in effect, 26 C.F.R. § 1.401(a)-1(b)(4). The Exelon Plan thereafter amended its definition of normal retirement age to comply with the new Treasury requirements.

II. District Court Proceedings

In rejecting petitioner's claim, the district court noted that section 1002(24)(A) "does not use 'age' as a stand-alone term, but instead states 'normal retirement age under the plan.' Moreover, the statute references the 'time' at which the participant attains normal retirement age, not the 'age' at which the participant attains normal retirement age." Pet. App. 32a. The court expressly considered the administrative interpretations cited by petitioner, *id.* at 33a-35a (citing Rev. Rul. 78-120, 1978-1 C.B. 117; 26 C.F.R. § 1.411(a)-7(b)(2)), as well as the case law on which petitioner relied, *id.* at 35a-37a (citing *Duchow v. New York State Teamsters Conf. Pension & Ret. Fund*, 691 F.2d 74 (2d Cir. 1982), *cert. denied*, 461 U.S. 918 (1983); *Laurent v. PricewaterhouseCoopers LLP*, 448 F. Supp. 2d 537 (S.D.N.Y. 2006)). The court found that the administrative interpretations did not support petitioner's position. To the contrary, they reflected the Internal Revenue Service's view that a plan "'may' specify any age under 65 as the normal retirement age." *Id.* at 33a (citing Rev. Rul. 78-120,

1978-1 C.B. 117); *see also* Rev. Rul. 80-276, 1980-2 C.B. 131; Rev. Rul. 78-331, 1978-2 C.B. 158. As for petitioner's cases, the court found none of these precedents persuasive. Pet. App. 38a ("There are no controlling nor compelling precedents on the issue before the court.").

The district court concluded that

> [w]hile the language of § 1002(24)(A) is open to interpretation, the better reading is that a plan may set a time (prior to the employee reaching age 65) that will qualify as normal retirement age, either by setting a specific age, a period of service or participation, or a combination of age and service/participation.

Pet. App. 38a Thus, the Exelon Plan's definition of normal retirement age was permitted under the statute. *Id.* Petitioner accordingly "had reached normal retirement age at the time he retired. Therefore, he was not entitled to an additional distribution based on a whipsaw calculation." *Id.* at 38a-39a.

Following the district court's dismissal of his claim, petitioner sought reconsideration on the ground that the court had failed to consider the 2007 Treasury regulation, 26 C.F.R. § 1.401(a)-1(b)(2); *see also* 72 Fed. Reg. 28,604, on which petitioner relies here. *See* Pet. 14-15, 21-29. That regulation provides that "normal retirement age under a plan must be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed." 26 C.F.R. § 1.401(a)-1(b)(2). The district court found that reconsideration of its order was not warranted:

> In [the prior opinion], the new regulation was not addressed because it is *prospective only and therefore inapplicable to plaintiff's lump sum distribution* that occurred years prior to the effective date of the new regulation. Plaintiff now argues that, even if not directly applicable to his situation, the regulation is an administrative interpretation of the statute that is subject to deference and instructive as to how the relevant statutes should be construed. There, however, is no indication that the new rule is based on a reinterpretation of the statutory definition of normal retirement age. The new regulation, which is prospective in nature, clearly states that prior to the May 22, 2007 effective date, a plan was "permitted to have a normal retirement age lower than age 65, regardless of the age at which employees customarily retire in a particular company or industry." 72 Fed. Reg. 28,604 (May 27, 2007) (citing Rev. Rul. 78-120, 1978-1 C.B. 117).

Pet. App. 20a (emphasis added).

III. Seventh Circuit Proceedings

The Seventh Circuit affirmed. The court first rejected petitioner's claim that the Exelon Plan's definition was improper because it did not define normal retirement age as an "age": "the Plan's formula — the participant's age when beginning work plus five years — is an 'age.' It is employee specific, to be sure, but 'age + 5' remains an age." Pet. App. 6a. Next, the court rejected petitioner's argument that the Exelon Plan's normal retirement age was not "normal": "§1002(24) does not compel a pension plan's retirement age to track the actuarial tables. If it did, then instead of granting discretion to the plan's sponsor the statute would read something like:

'The term "normal retirement age" means the median age at which participants in the plan retire.'" *Id.*

Finally, the court rejected petitioner's assertion that the 2007 regulation compelled a different result. "Fry contends that this regulation supports his position. It does not, because like almost all regulatory changes it operates only prospectively.... The regulation therefore does not affect the calculation of lump-sum distributions in 2003." Pet. App. 7a (citations omitted). The court went on to note that "[w]hether the regulation is within the scope of the agency's interpretive discretion, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is a question not presented here." *Id.*

REASONS FOR DENYING THE PETITION

Petitioner's claim does not warrant this Court's review. First, the petition presents an issue of no ongoing significance. In 2006, ERISA was amended to abolish the whipsaw calculation — foreclosing claims like petitioner's in the future. And a Treasury regulation effective as of May 2007 prospectively changed the administrative interpretation of the statute and imposed new restrictions on plans' definitions of normal retirement age that will govern future cases.

Second, petitioner has not identified and cannot identify any points in the Seventh Circuit's opinion that require correction by this Court. Petitioner is simply incorrect to assert that the Seventh Circuit "invalidated" the 2007 Treasury regulation or departed from this Court's holdings under *Chevron* and its progeny. The Seventh Circuit's approval of the Exelon Plan's definition of normal retirement age did not hold or even suggest that the new Treasury

regulation is inconsistent with the statute. And instead of disregarding the 2007 regulation — promulgated four years after distribution of petitioner's benefits — the court correctly found that the new regulation did not retroactively apply to petitioner's claim and properly declined to decide whether that regulation was within the scope of the agency's interpretive discretion. Pet. App. 7a.

Finally, the Seventh Circuit's opinion did not create a conflict among the circuits. The Second Circuit opinion cited by petitioner, *Duchow v. New York State Teamsters Conf. Pension & Ret. Fund*, 691 F.2d 74 (2d Cir. 1982), addressed a separate provision of ERISA altogether. The petition should be denied.

I. THE QUESTION PRESENTED IN THIS CASE IS OF NO ONGOING SIGNIFICANCE.

The issue in this case — whether, in 2003, petitioner was entitled to a whipsaw calculation based on the ERISA definition of "normal retirement age" — has been superseded by subsequent changes in the law. Because of statutory and regulatory changes since 2003, the question presented by the petition will not arise in the future.

First, in 2006, Congress enacted the Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 780. That statute, codified as relevant at 29 U.S.C. § 1053(f)(1)(B), abolished the whipsaw calculation altogether. *See* Pet. App. 2a (in 2006, "the addition to ERISA of 29 U.S.C. § 1053(f) brought the treatment of lump-sum distributions [from defined benefit and defined contribution plans] into harmony"). Thus, as the Seventh Circuit stated, the opinion below addresses only "the interaction between § 1002(24) and the *pre-2006* requirement of actuarial adjustments to the hypothetical balance" of a defined

benefit plan account. *Id.* at 8a (emphasis added). No whipsaw calculation claim like petitioner's can be brought under the new statutory scheme.

Second, the Treasury Department's 2007 regulation imposing restrictions on plans' definitions of normal retirement age will govern any disputes about such definitions after the 2007 effective date of the regulation. *See* 26 C.F.R. § 1.401(a)-1(b)(2) & (4); 72 Fed. Reg. at 28,605 ("modif[ying]" existing regulations and providing "rules restricting a plan's normal retirement age"). That regulation was not in effect when petitioner received his lump-sum distribution in 2003, *see infra*, at 13-15, but its effective date provision makes clear that it generally applies to all plans as of May 22, 2007. 26 C.F.R. § 1.401(a)-1(b)(4). Thus, petitioner challenges an interpretation of normal retirement age under the statute — arising in the context of the pre-2007 statutory and regulatory environment — that will have little or no significance going forward.

Because the Seventh Circuit's opinion will not govern future claims under ERISA, it does not warrant this Court's review.

II. THE SEVENTH CIRCUIT DID NOT MISAPPLY *CHEVRON* OR INVALIDATE ANY TREASURY REGULATION.

Petitioner asserts that the Seventh Circuit "held that [§ 1002(24)] unambiguously gives retirement plans *unfettered* discretion to define 'normal retirement age,' thereby invalidating the Treasury regulations on this subject." Pet. 15. Petitioner's description of the Seventh Circuit's holding is simply incorrect, and his argument that the effect of that holding is to invalidate the 2007 regulation is accordingly wrong. Petitioner further argues that the

Seventh Circuit failed to give *Chevron* deference to the 2007 regulation. But that too is a mistaken reading of the opinion: instead, the court correctly found that the legislative rule promulgated in 2007 did not apply to petitioner's claim.

1. Nothing in the Seventh Circuit's opinion suggests that section 1002(24)'s definition of "normal retirement age" permits only one interpretation. *See* Pet. App. 6a-7a. The only question before the Seventh Circuit, and the only question the court reached, was whether the Exelon Plan's definition of normal retirement age was consistent with the statutory text. *See id.* at 7a (issue beyond that proposition "not presented here"). That text broadly states that "normal retirement age" may be "the time a plan participant attains normal retirement age *under the plan*." 29 U.S.C. § 1002(24)(A) (emphasis added). The Seventh Circuit held only that this statutory definition allowed the Exelon Plan's pre-2007 treatment of normal retirement age, and that Fry's attempts to restrict the statutory definition based on dictionary definitions of "normal" and "age" were not supported by the statutory text. Pet. App. 6a-7a; *see also Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.").

Accordingly, petitioner's assertion that review is warranted because the Seventh Circuit's decision "invalidat[es]" the 2007 regulation, Pet. 15-16, is mistaken. The Seventh Circuit expressly stated that "[w]hether the [2007] regulation is within the scope of the agency's interpretive discretion, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is a question not presented here." Pet. App. 7a. Moreover, petitioner's argument

is directly contrary to this Court's holding that a "judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *see also Chevron*, 467 U.S. at 843 n.11 (court may uphold regulation even if it is not "the reading the court would have reached if the question initially had arisen in a judicial proceeding"). Because nothing in the Seventh Circuit's opinion even suggests that the statute bars the exercise of agency discretion, its decision as to the validity of the Exelon Plan's definition of normal retirement age in 2003 has no effect on the 2007 regulation.

Indeed, there is nothing improper about an agency adopting one interpretation of a statute at one time and a different interpretation later, under different circumstances, as the Treasury Department did here. *Chevron* itself involved this kind of a change — the Environmental Protection Agency changed its interpretation of the statutory term "stationary source" to implement the new policy directives of a new administration. As this Court explained, an agency interpretation of statutory language "is not instantly carved in stone," and the flexibility to adopt different interpretations of a statute to adapt to different policies and circumstances is a hallmark of the administrative process. 467 U.S. at 863. Here, the Treasury Department changed its position and adopted a *new* regulation to implement a *new* policy — the policy permitting phased retirement. *See* 72 Fed. Reg. at 28,604-05; Pet. App. 19a. Nothing in the Seventh Circuit's approval of a definition of

normal retirement age that was consistent with the prior administrative interpretation casts any doubt on the validity of the new interpretation. *See Long Island Care At Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007) (a change in agency interpretation alone presents no ground for disregarding a new interpretation).

2. Similarly, petitioner is incorrect to assert that the Seventh Circuit "refus[ed] to give *Chevron* deference to" the 2007 Treasury regulation. Pet. 16, 27. Contrary to Fry's assertion, the Seventh Circuit did not address whether *Chevron* deference to 26 C.F.R. § 1.401(a)-1(b)(2)(i) was warranted, because that regulation does not apply to Fry's claim. *See* Pet. App. 7a. Both the Seventh Circuit and the district court found that the 2007 regulation was not applicable in this litigation because it was adopted four years after the 2003 distribution of Fry's benefits, and was expressly given only prospective effect. *Id.* at 7a, 19a-21a. The courts' findings were both correct and unexceptional.

The 2007 Treasury regulation is a legislative rule that does not purport to apply retroactively. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."). To the contrary, the regulation's codification includes a highly detailed "effective date" provision which sets forth precisely when the regulation becomes effective for specific types of plans — none before 2007.[1]

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[1] *See* 26 C.F.R. § 1.401(a)-1(b)(4) ("Except as otherwise provided in this paragraph (b)(4), paragraphs (b)(2) and (3) of this

Additionally, as the district court explained, the Treasury Department made clear that the new regulation implemented a forward-looking "policy change." Pet. App. 19a. The Treasury Department expressly stated that "[t]his Treasury Decision *modifies* existing regulations" and "include[s] rules *restricting* a plan's normal retirement age." 72 Fed. Reg. at 28,605 (emphases added). The Federal Register release explains that under prior regulations, "a pension plan is permitted to have a normal retirement age lower than age 65, *regardless of the age at which employees customarily retire in the particular company or industry*." *Id.* at 28,604 (emphasis added) (citing Rev. Rul. 78-120 (1978-1 CB 117)). The 2007 regulation — after notice and comment — changed that rule for the future. *Id.* at 28,605 (stating that final rules impose "a requirement that the normal retirement age under a plan be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed"). The 2007 regulation is a classic example of a forward-looking legislative rule which changes existing policy and which contains no language that "requires" retroactive treatment. *Bowen*, 488 U.S. at 208. The Seventh Circuit was thus correct — and indeed required — not to treat the regulation as having retroactive effect. *Id.*; *see also Greene v.*

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section are effective May 22, 2007. In the case of a governmental plan ..., paragraphs (b)(2) and (3) of this section are effective for plan years beginning on or after January 1, 2009. In the case of a plan maintained pursuant to one or more collective bargaining agreements ..., paragraphs (b)(2) and (3) of this section do not apply before the first plan year that begins after the last of such agreements terminate determined without regard to any extension thereof ....").

United States, 376 U.S. 149, 160 (1964) (holding that under "'the first rule of construction ... that legislation must be considered as addressed to the future, not to the past,'" "it would be unjustifiable to give the 1960 regulation retroactive effect").

Petitioner asserts that *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), compelled the Seventh Circuit to apply the 2007 regulation to his 2003 benefit distribution. Pet. 22-26. But *Smiley* does not hold that a legislative rule that implements a change in regulatory policy must be given retroactive effect. In *Smiley*, this Court held that deference should be given to an agency's regulation *interpreting* — not changing — existing law. 517 U.S. at 741-44. The Court made clear that the interpretive regulation did not change the agency's substantive position. *See id.* at 742 ("[W]e do not think that anything which can accurately be described as a change of official agency position has occurred here. The agency's Notice of Proposed Rulemaking asserted that the new regulation 'reflect[s] current law ....'") (alteration in original). Indeed, although the *Smiley* petitioner had not meaningfully argued that deference to the agency's interpretation of existing law would amount to giving the regulation improper retroactive effect, the Court noted that "[t]here might be substance to" such an argument "if the regulation replaced a prior agency interpretation — which, as we have discussed, it did not." *Id.* at 744 n.3 (citing *Bowen*, 488 U.S. at 208-09). Here, where the 2007 regulation *did* implement a policy change and *did* replace a prior agency interpretation, *Smiley* does not apply.

III. THE SEVENTH CIRCUIT DID NOT CREATE A CONFLICT WITH THE SECOND CIRCUIT.

Petitioner also contends that the Seventh Circuit's decision "is directly at odds with the conclusion reached on this precise issue by the Second Circuit in *Duchow*" which, according to petitioner, "focused on the same question at the heart of this case." Pet. 29. But *Duchow* did not concern a plan-based definition of normal retirement age, but rather focused on a different ERISA provision altogether: 29 U.S.C. § 1053(a). *See Duchow*, 691 F.2d at 76-77; *see also* Pet. App. 35a ("Whether, consistent with § 1002(24)(A), normal retirement age could be measured by service time was not an issue before the [*Duchow*] court.").

Duchow held that, under section 1053(a), a plan cannot impose a service-based vesting requirement that is later than the statutory ceiling for normal retirement age. 691 F.2d at 80. Ignoring the actual holding of *Duchow*, petitioner focuses (at 30) on the *Duchow* court's observation that ERISA imposes "two discrete vesting requirements," one of which, normal retirement age, is "linked to age without regard to length of service," while the other, a years of service requirement, "depend[s] on length of service without regard to age." 691 F.2d at 77. The district court below recognized that this was merely a pithy way of explaining that normal retirement age is a distinct, stand-alone vesting benchmark under section 1053(a). *Duchow*, the district court explained, "did not actually address the issue of a normal retirement age based on service time," and the sentence cited by petitioner was "*dictum*." Pet. App. 35a-36a. In fact, *Duchow* went on to acknowledge that "[u]nder the statutory definition of 'normal retirement age,'

vesting cannot occur earlier than the tenth anniversary of the employee's joining the plan, *unless the plan itself provides for an earlier date.*" 691 F.2d at 78-79 (emphasis added). The court would not have used the term "date" rather than "age" if it intended to suggest that normal retirement age had to be defined as a single, specified age.

Because *Duchow* does not address the issue presented by petitioner's claim, there is no conflict between the Seventh Circuit and the Second. As the Seventh Circuit itself explained, its opinion "is the first appellate opinion" addressing the issue presented here.[2] Pet. App. 8a ("As far as we can tell, ours is the first appellate opinion on the interaction between §1002(24) and the pre-2006 requirement of actuarial adjustments to the hypothetical balance."). A number of other courts have also, without addressing the precise issue presented here, considered plans with normal retirement ages defined by years of service without intimating that the plans somehow violated ERISA. *See Ryan v. Asbestos Workers Union Local 42 Pension Fund*, 27 F. App'x 100 (3d Cir. 2002); *Bance v. Alaska Carpenters Ret. Plan*, 829 F.2d 820 (9th Cir. 1987); *Carter v. Central States, Se. & Sw. Areas Pension Plan*, 656 F.2d 575 (10th Cir. 1981); *Kern v. Retirement Plan for Employees of L.B.R., Inc.*, 751 F. Supp. 788 (S.D. Ind. 1990); *Nichols v. Board of Trs.*, 1 Empl. Benefits Cas. (BNA) 1868 (D.D.C. 1979);

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[2] Petitioner also points to a district court decision, *Laurent v. PricewaterhouseCoopers, LLP*, 448 F. Supp. 2d 537, 545-46 (S.D.N.Y. 2006), which held that "'a normal retirement age cannot be defined in reference to years of service.'" Pet. 31-32. As the district court here explained, the *Laurent* court mistakenly followed the same faulty interpretation of *Duchow* advanced by petitioner. Pet. App. 35a-36a.

Deonarain v. New York Life Ins. Co., No. 8:04CV466, 2005 WL 2002081, at *4 (D. Neb. Aug. 18, 2005); *Wachtell, Lipton, Rosen & Katz v. Comm'r*, No. 14574-90, 1992 WL 162645 (U.S. Tax Ct. July 14, 1992), *aff'd*, 26 F.3d 291 (2d Cir. 1994). All of these decisions are consistent with the Seventh Circuit's decision in this case.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

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In The Supreme Court of the United States

THOMAS FRY,

Petitioner,

v.

EXELON CORPORATION CASH BALANCE PENSION PLAN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTRODUCTION

Judge Easterbrook's opinion for the Seventh Circuit: (a) misinterprets a core provision of ERISA, (b) invalidates a Treasury regulation's reasonable interpretation of that statutory provision, and (c) draws the Seventh Circuit into conflict with the Second Circuit. The Exelon Corporation Cash Balance Pension Plan ("the Plan") Opposition Brief attempts to conceal these realities. Petitioner files this Reply to address the new issues raised by the Plan.

The Exelon Corporation adopted its definition of "normal retirement age" in an effort to exempt itself from Treasury Department regulations.[1] Despite prior rulings that drafting around ERISA mandates was prohibited,[2] Judge Easterbrook blessed Exelon's stratagem. App. at 4a. In so doing, he ignored clear congressional intent, Treasury regulations and this Court's holdings on deference to agency interpretations of law. Petitioner respectfully requests the Court seek Treasury's view on this issue.

Contrary to the Plan's assertions, this case raises compelling questions of ongoing national importance regarding the interpretation of a core provision of ERISA ("normal retirement age") and the deference

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[1] *See Fry v. Exelon Corporation Cash Balance Pension Plan*, No. 09-cv-53, Doc. No. 30 at 15 (N.D. Ill. Nov. 12, 2009), where the Plan argues its definition of "normal retirement age" exempts it from ERISA's anti-backloading provisions.

[2] *See Esden v. Bank of Boston*, 229 F.3d 154, 173 (CA2 2000) ("The Plan cannot contract around the statute."); *West v. AK Steel Corp. Ret. Accum. Pension Plan*, 484 F.3d 395, 408 (CA6 2007) (same).

owed to executive agencies charged with interpreting the law, which directly impact thousands of Americans. Judge Easterbrook's opinion strikes a blow to one of ERISA's core purposes (to provide for *retirement* benefits - *see* Cert. Pet. at 11-12), and raises profound questions regarding the rule of law and separation of powers. Only this Court can settle the conflict the Seventh Circuit's ruling creates between itself, Treasury and other Circuits. If the ruling below is allowed to stand, other employers will adopt similar definitions of "normal retirement age" to avoid ERISA's safeguards. This case deserves the Court's review.

REASONS FOR GRANTING THE PETITION

A. The Plan's Argument that this Case Raises No Questions of Ongoing Significance Misrepresents the Law and Distorts the Seventh Circuit's Decision.

The Plan claims that "the petition presents an issue of no ongoing significance" because: (1) the Pension Protection Act of 2006 ("PPA") "abolished the whipsaw calculation altogether" and (2) the Treasury Department's 2007 regulation regarding the definition of 'normal retirement age' will govern future disputes. Opp. Brief at 8, 9-10. Both claims are false.

1. Even under the PPA, plans must perform a "whipsaw calculation" if the rate at which interest is credited under the plan is greater than a market rate of return.

Contrary to the Plan's (and the Seventh Circuit's) assertion that the so-called "whipsaw calculation" is dead (Opp. Brief at 9-10; App. at 3a), ERISA and Treasury still require plans to perform a whipsaw calculation if the plan's interest crediting rate exceeds a market rate of return. *See* 26 U.S.C. § 411(b)(5)(B)(i)(I) ("An applicable defined benefit plan shall be treated as failing to meet the requirements of paragraph (1)(H) unless the terms of the plan provide that any interest credit (or an equivalent amount) for any plan year shall be at a rate which is not greater than a market rate of return."); IRS Notice 2007-6 (same); *The Boeing Company*, 2008 WL 485464, 5 (S.E.C. No-Action Letter) ("cash balance plans can be tested for compliance . . . without the need to take into account projections to normal retirement age, as long as the rate at which interest is credited to the participants' accounts is not greater than a market rate of return.").

Because many plans, including the Plan, provide interest credits that exceed a market rate of return, ERISA continues to require a whipsaw calculation when "cash balance" plans make lump sum distributions before normal retirement age. Thus, the Plan's argument that this petition should be denied because "whipsaw" is dead misrepresents the law.

2. *Treasury's 2007 regulation will not govern future disputes if Judge Easterbrook's ruling is allowed to stand.*

The Plan's claim that Treasury's 2007 regulation settles matters going forward is also false. The 2007 regulation will govern future disputes only if it validly interprets ERISA. But because Judge Easterbrook has held that ERISA clearly permits what the regulation specifically prohibits, the 2007 regulation will govern future disputes *only if Judge Easterbrook's ruling is overturned*.

The Plan distorts the question presented to the Seventh Circuit. According to the Plan, the only question below was whether the Plan's definition of normal retirement age was *consistent with* ERISA's text. Opp. at 11. The Plan is incorrect. The Court will look in vain for the words 'consistent', 'inconsistent' or their cognates in Judge Easterbrook's opinion. The issue of whether the Plan was consistent with ERISA's text was not even discussed, much less was it the "only issue" before the court.

Judge Easterbrook framed the issue in terms of the discretion ERISA gives employers. App. at 5a ("How much discretion employers enjoy when selecting a 'normal retirement age' depends on the language of ERISA"). Despite ERISA's silence on employer discretion, Judge Easterbrook held that ERISA unambiguously provides employers essentially unlimited discretion. *Id.* at 7a ("Under [ERISA] an age is the 'normal retirement age' because the plan's text makes it so."). He concludes by underscoring that, under his interpretation, ERISA *permits* precisely what the 2007 regulation *prohibits*: "[W]e have

analyzed the statutory language directly. . . . [T]he statutory language allows employers to specify a 'normal retirement age' that differs from typical retirement patterns." *Id.* at 8a. The court's holding directly contradicts Treasury's 2007 regulation, which requires that "the normal retirement age under a plan be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed." App. at 52a.

What the Seventh Circuit has held ERISA unambiguously *permits*, the Treasury Department cannot *prohibit*. *See FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954) (agency cannot make illegal by regulation what is legal under the statute); *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134-135 (1936) ("A regulation which . . . operates to create a rule out of harmony with the statute, is a mere nullity.").

The Plan's claim that this case is not worthy of this Court's attention because "whipsaw" is dead and the 2007 regulation will render Judge Easterbrook's bizarre rulings harmless on a going-forward basis are false and contrary to law. If allowed to stand, the ruling below not only creates a conflict with the Second Circuit, invalidates reasonable Treasury regulations and strikes a blow to ERISA's core purposes, it directly threatens the pensions of thousands of Americans participating in plans, which like Exelon's, impermissibly define "normal retirement age" to avoid ERISA's and the IRC's requirements.

B. The 2007 Regulation was *Not* a "Change in Agency Policy" on the Permissibility of Defining "Normal Retirement Age" Without Specifying an Age.

Judge Easterbrook held that ERISA unambiguously permits what the 2007 regulation prohibits, thereby invalidating the regulation. The Plan pretends this has not happened and focuses attention elsewhere. The Plan argues the Seventh Circuit properly refused to give the 2007 regulation "retroactive" application because it purportedly amounted to a "change in agency policy." Opp. at 12-15. The Plan's argument is a red herring. For the alleged "change in agency policy" to excuse a court from giving *Chevron* deference to Treasury's reasonable interpretation of the statute, the change must have impaired the Plan's legal rights or reasonable expectations. *See Landgraf v. USI Film Products,* 511 U.S. 244, 265-266, 269-270, 280 (1994). Here, however, neither the lower courts nor the Plan attempt to show that Treasury *permitted* plans to define "normal retirement age" as a "five-years vesting service" without specifying an age *before the 2007 regulation*. Treasury *never* permitted plans to define "normal retirement age" without specifying a chronological age. Treasury has always required that normal retirement age be specified as *an age*. *See* Cert. Pet. at 4-6. Consequently, the 2007 regulation did not impair Exelon's rights or reasonable expectations.

1. Revenue Ruling 78-120 did not approve defining "normal retirement age" without specifying an age.

The Seventh Circuit (without analysis of prior agency rulings and regulations) found that, prior to the 2007 regulation, Treasury gave employers *carte blanche* to define "normal retirement age" without specifying an age. App. at 4a, 7a. The only alleged support for that claim is Rev. Rul. 78-120.[3] But Rev. Rul. 78-120 did not permit the Plan's "five-years vesting service" definition and nowhere suggests that plans may define "normal retirement age" without specifying an age. In fact, Rev. Rul. 78-120 was written to provide guidance only for plans that *do* specify an *age* as "normal retirement age." Rev. Rul. 78-120 (describing the plan-type addressed as "provid[ing] that, *upon attaining a certain specified age* (less than 65)") (emphasis added). Treasury concluded that *such a plan* "will not fail to qualify under section 401(a) of the Code merely because it provides for a normal retirement age of less than 65." *Id.* In the process of explaining its position, Treasury assumes every qualifying plan specifies an age as normal retirement age. *Id.* ("a plan may specify any age that is less than 65 as the normal retirement age. However, if the normal retirement age specified in a plan is less than 55 . . ..").

No fair reading of Rev. Rul. 78-120 could find that Treasury gave the green light to define "normal

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[3] The only authority the Seventh Circuit offers is the commentary in the 2007 Regulation itself, which refers to Rev. Rul. 78-120. *Compare* App. at 7a and 49a.

retirement age" as "five-years vesting service" without specifying an age. Consequently, the 2007 regulation was not a "change in policy" that transformed the Plan's definition from "permissible" to "invalid," and did not otherwise interfere with the Plan's rights or legitimate expectations.

2. *Treasury, consistent with Congressional intent, has always required "normal retirement age" to be defined by reference to a specified age.*

Congress made clear its intention that "normal retirement age" be "defined by regulations" and should be an "age." *See* S. Rep. 93-383, 1974 U.S.C.C.A.N. 4889, 4936 (Aug. 21, 1973) ("The term 'normal retirement age' is to be defined by regulations. It is expected that a minimum and maximum age will be taken (perhaps 55 and 65)"). For decades prior to Rev. Rul. 78-120, Treasury consistently required normal retirement age to be defined as a *specified age*. *See, e.g.*, Rev. Rul. 56-693, 1956-2 C.B. 282; 21 Fed. Reg. 7269, 7279 (Sep 25, 1956) ("Normal retirement age is not lower than age 65 for men and not lower than age 60 for women."); Cert. Pet. at 4-6 (discussing regulatory history).

There is no legal or factual basis for the claim that prior to the 2007 regulation the Plan's definition was valid under Treasury regulations. The Plan, therefore, avoids the subject. Instead, the Plan claims that the 2007 regulation amounted to a "change of policy." Opp. at 4-5, 13-15. This is simply a red herring. The alleged "change in policy" did not transform the Plan's definition from "permissible" to "invalid." It did not interfere with the Plan's existing rights or reasonable

expectations. Rather, the 2007 regulation simply announced *another reason* the Plan's definition is invalid. The Plan's definition of normal retirement age was invalid both before and after the 2007 regulation.

C. The Plan's Attempt to Characterize Deferring to Treasury's Consistent and Reasonable Interpretation of ERISA and the IRC as an "Impermissible Retroactive Application of Law" is Baseless.

Courts are appropriately hesitant to apply a "change in law" retroactively to deprive people of legal rights on which they relied. *See Greene v. U.S.*, 376 U.S. 149, 160 (1964) ("a retrospective operation will not be given to a statute which interferes with antecedent rights"). But that is not the situation here. Here the Plan *never* had a right or a reasonable expectation that it could define "normal retirement age" as "five-years vesting service" without specifying an age as normal retirement age. Nevertheless, the Seventh Circuit accorded the Plan the same protection as those whose rights have actually been taken away. App. at 7a. This Court should make clear that it rejects the Seventh Circuit's dramatic expansion of the rule against "retroactive" application of changes in law.

Similarly misplaced is the Plan's argument that the courts below were not required to give *Chevron* deference to Treasury's interpretation of the law because the "effective date" of the 2007 regulation was after petitioner received his lump sum distribution. Opp. at 13-15. This Court has squarely rejected that argument, referring to the Plan's and Seventh Circuit's position as "absurd." *See Smiley v. Citibank (South*

Dakota), N.A., 517 U.S. 735, 740-742 (1996); *see also* Cert. Pet. at 22-26. The Plan's position bears no scrutiny.

D. The Seventh Circuit's Ruling Conflicts with the Second Circuit's Longstanding Recognition that Definitions of "Normal Retirement Age" Solely by Reference to a Period of Vesting Service Formula are Invalid.

The Plan claims that because this case does not address the precise question presented to the Second Circuit in *Duchow v. New York State Teamsters Conf. Pension and Ret. Fund*, 691 F.2d 74 (CA2 1982), no conflict exists. Opp. at 16-17. But a "conflict" exists when the positions adopted by the circuits are mutually inconsistent. The Plan here makes no effort to explain how the ruling in *Duchow* -- that ERISA prohibits a definition of "normal retirement age" based solely on "years of vesting service" -- and the decision below – that such a definition is expressly permitted by ERISA -- can both be correct. They cannot. *See* Cert. Pet. at 29-33; *see also Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 281 n.3 (CA3 1988) ("absent an express provision as to age in a pension plan the normal retirement age is 65 pursuant to ERISA.") (superseded on other grounds).

Because the Seventh Circuit's ruling that a vesting service formula definition of "normal retirement age" is permissible contradicts the Second Circuit's ruling in *Duchow* (as well as Treasury's long-standing requirement that an age be specified as normal retirement age), there is a genuine conflict between the circuits. *See also Hlinka*, 863 F.2d at 281 n.3.

CONCLUSION

The errors in the Judge Easterbrook's opinion for the Seventh Circuit raise vital questions of ongoing national importance regarding the interpretation of a core provision of ERISA. Judge Easterbrook's holding that ERISA directly addressed the question of Plan discretion in defining "normal retirement age" and gives plans unfettered discretion to define that expression strikes a blow to one of ERISA's core purposes (to provide for *retirement* benefits) and raises profound questions regarding the rule of law and separation of powers.

The Court should grant the petition for a writ of certiorari or summarily reverse and remand the Seventh Circuit's ruling, with instructions to follow this Court's rulings in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) ("if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute") and *Smiley*, 517 U.S. at 740-741, 744 n.4 ("it would be absurd to ignore the agency's current authoritative pronouncement of what the statute means.").

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